

VERBATIM ¹RECORD OF TRIAL ²

(and accompanying papers)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

[REDACTED]

(Social Security Number)

PFC/E-3

(Rank)

Headquarters and

Headquarters Company,

United States Army Garrison

(Unit/Command Name)

U.S. Army

(Branch of Service)

Fort Myer, VA 22211

(Station or Ship)

By

GENERALCOURT-MARTIAL

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

on

see below

(Date or Dates of Trial)

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¹ Insert "verbatim" or "summarized" as appropriate. (This form will be used by the Army and Navy for verbatim records of trial only.)

² See inside back cover for instructions as to preparation and arrangement.

1 produced to the defense, one 1st AD 15-6 that was produced to the
2 defense. So, Department of the Army files have been being produced
3 to the defense, especially anything within our actual prosecutorial
4 files that we intend to use at trial, both on the merits or
5 sentencing. This is Headquarters DA staff documents, based off of
6 our due diligence request that we just received in the last 30 days
7 or since the defense filed their filed their initial motion that we
8 are, now, starting to review, originally, for *Brady* purposes. And,
9 again, to know how these documents could be material to the
10 preparation of defense--but we have them now and we'll start
11 reviewing them as well--if we find anything that's material to the
12 preparation of the defense--to turn over to the defense.

13 MJ: Okay.

14 CDC[MR.COOMBS]: And, again, this will be the issue that we
15 discuss for the due diligence, but it's the timing, not only when you
16 made the initial request, but did you follow up and you didn't
17 receive anything back. And it's clear, here, if we didn't receive
18 this memorandum, we wouldn't know that HQDA didn't task--or didn't
19 respond back to the request. This went out to all the principals,
20 this wasn't just HQDA, this was all the principals within HQDA. And
21 that's how it landed on TDS's desk. So, it's not an indication of
22 the government's diligence, it's just the opposite; an indication of
23 the government's non-diligence to----

1 MJ: Well, let's litigate that piece of it next time.

2 CDC[MR.COOMBS]: Understood.

3 MJ: All right. Anything else with respect to the motion to
4 compel discovery?

5 TC[MAJ FEIN]: Other than the remaining issues for the
6 Department of State witnesses tomorrow, no, Your Honor.

7 MJ: Okay. All right. We have one last discovery motion and
8 that's to identify the *Brady*. Do we want to--I'll leave that up to
9 you. Do you want to do it this afternoon, or do you want to do it
10 tomorrow?

11 CDC[MR.COOMBS]: We'll do it now, ma'am, if that's okay?

12 MJ: It's fine. Just--that would be--the motion, itself, is
13 Appellate Exhibit 93. The prosecution response is Appellate Exhibit
14 94 and the defense reply is Appellate Exhibit 95.

15 ADC[CPT TOOMAN]: Thank you, Your Honor. Your Honor, it's the
16 defense's contention that the circumstances in this case warrant--
17 justify the government specifically identifying *Brady* information for
18 the defense. If you look at the *Hsia* case that was cited by the
19 government--cited by the defense--look at that case, they do no
20 analysis. They look at the discovery in that case and they say,
21 "There are 600,000 files and, government, you've got to identify the
22 *Brady*. You can't expect the defense to sift through that and find
23 the *Brady* material." And so there's case law to support the

1 defense's position that this is an appropriate remedy without any
2 other analysis other than sheer volume.

3 MJ: Well, Captain Tooman, right now, aren't we only talking
4 about the FBI files?

5 ADC[CPT TOOMAN]: Well, potentially, Your Honor, but what's
6 clear is the government has not understood their *Brady* obligation----

7 MJ: What other files are we talking about?

8 ADC[CPT TOOMAN]: Well, we have 450,000 pages of discovery;
9 there could be *Brady* in there as well.

10 MJ: Oh, so you want the government to go through everything
11 they've given you from day one to see if there's *Brady*--to separate
12 *Brady* from the non-*Brady*?

13 ADC[CPT TOOMAN]: Well, it's the defense's position, Your Honor,
14 that--and I think this will come out during the due diligence
15 argument--if the government was doing their due diligence with
16 relation to *Brady*, they would have been keeping track of what
17 material was *Brady*. The defense's position is also, going forward,
18 we would request that they specifically identify that; that would be
19 the main request.

20 MJ: So, you have a witness statement, for example, and
21 paragraph two is exculpatory and paragraph three is not. Are they
22 going to be highlighting that paragraph for you?

1 ADC[CPT TOOMAN]: Well, Your Honor, we think that, going
2 forward, that would be an appropriate remedy. As they're going
3 through the discovery, they're reviewing this, they're making the
4 determination whether or not something is *Brady* material. It would
5 not be unduly onerous for them to pick up a highlighter and say,
6 "That's *Brady*." We don't know how much discovery is left out there
7 and we think the circumstances, in this case--and I would point the
8 *Salyer* case where they talk about a number of factors would justify
9 that sort of remedy for the defense. And in--those factors are
10 enumerated in the defense motion, but one of the key factors and
11 probably the key factor is the defense access to discovery. And in
12 every case that the government cited, that was kind of the factor
13 that turned the decision one way or another. In the cases cited by
14 the government, the defense had equal access and equal opportunity to
15 view all the discovery. That's clearly not the case with PFC
16 Manning's situation.

17 As the motion discusses, we are geographically separated as
18 a defense team. We do not all have equal access to the discovery
19 materials. There are a number pieces of discovery--classified
20 discovery where we need to coordinate with our security experts or go
21 to a certain place. So, we don't have equal access and an individual
22 who particularly does not have equal access is PFC Manning. He
23 cannot see a large portion of his discovery.

1 MJ: Well, isn't that because there's a protective order that
2 says he can't see it?

3 ADC[CPT TOOMAN]: Some of it's because of a protective order,
4 Your Honor, but also all the unclassified discovery is very difficult
5 for him to see. He is in confinement, there's no means for him to
6 view his discovery in the JRCF. There's--when we go visit him at the
7 JRCF, there's not a computer there where we can take discs in and
8 show him discovery and discuss his case with him. It's clear from
9 the defense's reply motion and the attachment, it's not so easy to
10 bring PFC Manning out to visit us at TDS offices at Fort Leavenworth.
11 The government fought us on that pretty hard; they don't like to do
12 that because there's a lot of moving parts. And so, PFC Manning is
13 in a situation where he can't actively participate in his defense.
14 And Your Honor is absolutely correct: some of that is because of
15 protective orders, but it's also the case for the lion's share of the
16 evidence in this case. He just--he can't look at it. As defense
17 counsel, we can't print 450,000 pages and carry it with us to the
18 JRCF. And even if we did that, the JRCF setup is such that the
19 escorts are sitting right outside the door, they often times can hear
20 the conversations that are taking place within the room where we
21 would meet, and so really discussing and getting into the nitty
22 gritty of PFC Manning's case with him is well-nigh impossible. And
23 so, that factor swings heavily in favor of the defense.

1 The other factors are that he has no corporate assistance.
2 There's no parallel civil litigation where there's sort of an entity
3 that would--or another reason why he would be looking at it or other
4 attorneys working on it. The other big factor considered by *Salyer*
5 is that they looked at the size of the defense team in relation to
6 the size of the government. Well, here, the government has four,
7 maybe five attorneys working on this case full time whereas the
8 defense has three individuals, there's Mr. Coombs, there's myself,
9 and Major Hurley, and, at least in the case of Major Hurley and
10 myself, we have other obligations, we have other clients, we have
11 other courts-martial and other things that take our time. We're not
12 dedicated, solely, to PFC Manning. And so, when you look at the
13 imbalance between the government--the size of the government and the
14 size of the defence, that weighs in favor of the government having to
15 specifically identify *Brady* information.

16 Of course, the other factor is the discovery is voluminous.
17 We have, as Your Honor mentioned, 7,000 pages of--well, actually,
18 closer to 8,000 pages of FBI material, but as we learned today,
19 that's only 20 percent of the file--or roughly 20 percent of the
20 file. That's a 45,000 or 40,000 page file that we may or may not
21 need to go through, plus any other *Brady* material or any other files
22 that may come up.

1 Now, the government cites the *Skilling* case as their main
2 authority and it's important to note that the *Skilling* case, while it
3 said the government doesn't need to specifically identify *Brady*, they
4 identify three circumstances where that would be an appropriate
5 remedy. It's the defense's position that each of those circumstances
6 is applicable to PFC Manning's case.

7 The first situation is padding the filing. And what is
8 clear, here, is they talk about handing over to the defense what
9 amounts to at least *Brady*.

10 MJ: Didn't you asked for more than *Brady*?

11 ADC[CPT TOOMAN]: We have, Your Honor.

12 MJ: Okay.

13 ADC[CPT TOOMAN]: Yes. And the other issue with the padding is
14 the late hour at which we're getting this discovery.

15 MJ: So is it the defense's position that the government, in
16 handing over more than the *Brady* and the FBI file, is basically
17 padding the file so you can't find the *Brady*?

18 ADC[CPT TOOMAN]: We think that it's appropriate for the
19 government to identify the *Brady* as they're already doing as part of
20 their review of these documents. We're not asking the government to
21 do anything they're not already doing. They've asserted to this
22 court a number of times that, "As we review these files, we are
23 identifying what's *Brady* and what's not *Brady*." So, all the

1 government--or all the defense is requesting is that--pick up a
2 highlighter and highlight it so we can go right to it.

3 The other factor--the other scenario that *Skilling*
4 contemplates is that the discovery is unduly onerous on the defense.
5 And what the defense thinks ties in directly with that are the
6 factors from the *Salzer* court where you look at the size of the
7 defense team, as well as the access that we're afforded. So, the
8 arguments that we made as far as access and size of the defense team
9 we think apply to the unduly onerous sort of situation contemplated
10 by *Skilling*.

11 And, finally, the last scenario that *Skilling* contemplates
12 is bad faith. Has the government been acting with bad faith and, if
13 so, they need to be specifically identifying *Brady* and we think that
14 the government has been acting with bad faith.

15 MJ: How do you think the government has been acting in bad
16 faith?

17 ADC[CPT TOOMAN]: Well, Your Honor, we would--at some point in
18 the future, we're going to discuss the due diligence--certainly, the
19 due diligence argument that Mr. Coombs set forth earlier today, we
20 think, ties into a bad faith. Your Honor, we think the way the
21 government answers what seem to be very clear questions from this
22 court, in sort of loose-step ways, amounts to bad faith. What we've
23 talked about today with ONCIX, where the Court asked a very clear

1 question: "Is there anything from ONCIX?" And the government says
2 no, and they play semantics when it's clear what the government
3 wants--or what the Court is asking. When the Court asks the
4 government, "Is anyone from the FBI testifying or is an FBI agent
5 testifying?" the government says, "Yes, for sentencing, maybe, or
6 maybe to authenticate a document," and then, 10 minutes later, they
7 talk about someone from the FBI testifying on sentencing, but they
8 don't talk about that with your original query because that person
9 is, technically, not an agent. It's clear what the Court is asking.
10 And so, these--this is sort of the attitude the government has had
11 throughout this case: when it's clear--we don't check common sense
12 at the door, Your Honor. It's clear what's being requested and the
13 government isn't forthcoming.

14 And, finally, just the fundamental misunderstanding the
15 government has had for basic principles of discovery. Earlier, a
16 couple months ago, this court ruled that the government didn't
17 understand *Brady* obligations and now, today, the government [sic], 2
18 years after this trial has started, is explaining to the government
19 basic principles of 701(a)(2). And we think all those things,
20 combined together, is tantamount to bad faith, Your Honor.

21 And, finally, the last point is, again, the government is
22 already reviewing these materials, they're already making a
23 determination when they read these things that something is or is not

1 Brady. If they're already doing that, it's not unduly onerous for
2 the government to highlight it and say, "Hey, there's *Brady* material
3 here." Thank you. Subject to your questions----

4 MJ: I think I just asked them.

5 ADC[CPT TOOMAN]: Thank you, ma'am.

6 TC[MAJ FEIN]: Your Honor, first and foremost, the government
7 contends there's no authority the defense has cited or has found to
8 order the government to identify the material----

9 MJ: Now, let me ask you that. I know I'm just reading the case
10 law that both parties have supplied and neither Federal Rule of
11 Criminal Procedure--I believe it's 16 that was applicable--or R.C.M.
12 701 talk about identifying *Brady* material. The cases that did it,
13 did it sort of as an inherent power of the Court for housekeeping, if
14 you will, or of "case management" I believe that's the way they
15 phrased it.

16 TC[MAJ FEIN]: Yes, ma'am.

17 MJ: Does the government--contesting that that I have the
18 authority to do that with case management?

19 TC[MAJ FEIN]: No, ma'am.

20 MJ: Okay. Proceed.

21 TC[MAJ FEIN]: So, there's no direct authority--you're inherent
22 authority. First and foremost, Your Honor, the case--the line of
23 cases that the defense relies upon aren't even really applicable to

1 this case. We are talking about, at the time, there was 7,000

2 documents--pages of information, about 600 documents----

3 MJ: Are you talking about just the FBI files?

4 TC[MAJ FEIN]: We are--of what they've been produced so far--

5 just what we have--at a minimum, require *Brady*----

6 MJ: I think I just heard Captain Tooman say they want you to go
7 back to everything you've produced and do it?

8 TC[MAJ FEIN]: They do, Your Honor, but I'm sticking to what was
9 written in the motion and not 7,000--but after the motion, we
10 produced the final batch of the FBI law enforcement investigation and
11 it came out to approximately--almost 9,000 pages. So, the majority
12 of these cases--or all of the case deal with an extreme amount of
13 discovery. The government isn't trying to contend that, in a normal
14 military justice case, the fact that we've turned over 400,000 pages--
15 -it would seem extreme, but these cases focus on 600,000 documents,
16 millions of pages and it's just not applicable to this case.
17 Additionally, and more importantly, the defense is contending that
18 the prosecution prepare the defense's case by highlighting certain
19 information such as *Brady*. The requirement is to disclose the *Brady*,
20 under 701(a)(6) as soon as practical. Once we get approval, we do it
21 as soon as possible; we turn it over to the defense. What isn't
22 happening--and--is that we suddenly highlight it and the version we
23 turn over we delete. We simply--in order to expedite the process,

1 document reviewing, and getting the documents to the defense, we--if
2 we identified something that qualifies as *Brady*, we identified the
3 document and then we moved on after we go through an approval
4 process.

5 MJ: Well, let me ask you the question, then: if you said you--
6 let me make sure I understood you correctly. When you highlighted a
7 document that you said is *Brady*, the government has some kind of a
8 record on, "Okay, we've highlighted this document, this document,
9 this document, this document"?

10 TC[MAJ FEIN]: No, Your Honor, we determine, based--we determine
11 if a document is discoverable or not, if it's discoverable under
12 multiple standards including *Brady*, then we annotate that and then,
13 if we have to get approval, we get approval. If we don't, then we
14 simply turn it over as soon as possible.

15 MJ: Okay.

16 TC[MAJ FEIN]: So, now to this--some of the points, just for
17 oral argument--first the--talked about our case--this case is not
18 analogous to the cases simply because of the facts. We're not
19 talking about 600,000 documents and millions of pages. Second, the
20 defense's access to discovery--us identifying *Brady* wouldn't cure,
21 unfortunately, Private First Class Manning's access to his documents.
22 Because of the charges, he's in pre-trial confinement. So, if the
23 defense is wanting to take documents to him, they have to choose what

1 documents. It wouldn't matter if *Brady* was identified or not. And
2 the government--every time---

3 MJ: Wait, I'm not sure I understand that. If *Brady* is
4 identified, can't they say, "I'm going to take these *Brady* documents
5 and *Brady* rules"?

6 TC[MAJ FEIN]: They could, Your Honor. We could also identify
7 every witness for them and highlight that and they say, "I want to
8 take witness filing documents, today, to Private First Class
9 Manning." We're doing the job for them, they then can take witness
10 filing and take them to pre-trial confinement facilities. So,
11 absolutely, Your Honor, that would help the defense prepare their
12 case.

13 MJ: Let me ask a question, here, just--I'm going a little bit
14 aside, here, but Captain Tooman has represented that PFC Manning--
15 it's difficult for him to get documents to Fort Leavenworth. I mean,
16 is there--are there possibilities that, you know, as we hold these
17 Article 39(a) sessions, that he could be extended for some period of
18 time to do that?

19 TC[MAJ FEIN]: Your Honor, you can work to answer that question
20 and that's where I was going, here----

21 MJ: I see, okay.

22 TC[MAJ FEIN]: ----every military defense counsel has been
23 issued a courier card to move classified information. Every military

1 defense counsel on this case, prior to Captain Tooman and Major
2 Hurley coming on board, have safes in their offices to hold
3 classified information. The second Private First Class Manning was
4 moved to Fort Leavenworth, Captain Tooman was detailed to the case as
5 local counsel, we moved a safe to his office--the government did
6 based on the defense's request--for them to use it. In fact, the
7 defense requested, immediately, to be able to pull Private First
8 Class Manning out of confinement--out of the pre-trial confinement to
9 hold meetings in the defense's office in order to discuss documents
10 and prepare the case, so there's nothing preventing that. Sure,
11 there's a minor bureaucratic process, but the request has to be
12 submitted and, at this point, no request has ever been denied for
13 that. Now, the original request did have to be processed through,
14 again, this minor bureaucratic process, but that was figured out once
15 Private First Class Manning was moved to Fort Leavenworth.

16 MJ: So, am I understanding that he has the same access as--at
17 Fort Leavenworth that he would here?

18 TC[MAJ FEIN]: Absolutely, Your Honor.

19 MJ: Okay.

20 TC[MAJ FEIN]: The issue is pulling out of confinement under the
21 normal Army Confinement Command procedures. So, the issue is is he
22 physically located, there, at the TDS office near it, or is he at the
23 local area at this TDS office at Fort Myer. When he was at a

1 previous confinement facility, he was moved to Fort Myer and sat in
2 Major Kemkes' office with a safe.

3 So, everywhere the defense counsel has been detailed by TDS
4 on this case, they've been granted security clearances, they've been
5 granted safes--or given safes in their offices--big five-drawer safe
6 to hold whatever it is. They've been given computers; stand-alone,
7 classified computers--three of them to be able to use them in any
8 manner, essentially, under the protective order, that they see fit.
9 If they wanted the ability to move one to Fort Leavenworth, they can
10 do that. If they wanted us, the government, to send information to
11 Fort Leavenworth as requested when Captain Tooman came on board, they
12 opted not to have that happen. They opted for the material to stay
13 in the local area. The only time the government, to the best of my
14 recollection, has denied, initially, a request for resources, was
15 setting up a government facility for the civilian defense counsel,
16 Mr. Coombs, near his office in Providence, Rhode Island. But, after
17 discussion with the Court, with the defense, and the protective
18 order, the government even set up a facility within a 30-minute drive
19 for Mr. Coombs to prepare. So, every defense counsel, including the
20 civilian, can prepare the case. The government has a FedEx account
21 to move classified information; we can make it available, we just
22 have to be asked. And, at this point, other than originally pulling
23 Private First Class Manning out of confinement for the original

1 meetings, we've never not been able to execute a reasonable request
2 or any request at this point. That's resources, Your Honor, and
3 Private First Class Manning's access to information--corporate
4 assistance--this--it's, essentially, the same issue. Private First
5 Class Manning chose to hire civilian defense counsel. If the law
6 firm of Mr. Coombs needs more help, they can hire more people. All
7 they have to do, from the government's perspective, is provide
8 notification to the Court, get a security clearance, and detail more
9 people working on this case. If they need more military defense
10 counsel, they need to ask TDS and, to the best of our recollection,
11 it hasn't been asked, but no one has addressed that with the
12 government to help in that endeavor. So, they can have more
13 resources, they haven't asked. A civilian defense counsel can hire
14 more people, but that has not occurred. So, again, this is just a
15 way for the defense to have the government prepare its case in order
16 to defend Private First Class Manning versus taking the time that
17 they had to review the documents that we've already reviewed and
18 turned over.

19 Absent any other questions, Your Honor, we rely on the
20 remaining portions of our written brief.

21 MJ: All right. Thank you. Yes?

22 ADC[CPT TOOMAN]: Your Honor, at issue right now, today, may be
23 7,000 papers but we don't know what is going to be at issue a week

1 from now or 2 weeks from now or a month or 2 months from now. So,
2 while the cases the defense cited may have pointed to cases where
3 there are lots and lots of discovery, it's not out of the realm of
4 possibility that that could be the case here. And so, we're trying
5 to get out in front of that.

6 Here, the government knows the defense's theory; that's
7 been pretty clear over the past few 39(a) sessions and--that there is
8 no damage. So, the government saying that they have to do either the
9 defense case for--prepare the defense case for it--and, in fact, one
10 of the cases cited talks about how, you know, in order for the
11 government to identify *Brady*, the defense needs to tell the
12 government the theory. Well, the government knows the theory. The
13 theory is that this leak--that these alleged leaks haven't done any
14 damage. So, the government is well aware of that.

15 Now, the government talked about them IDing *Brady* and they
16 say, "Okay, this is something we have to turn over." What's clear
17 from each of these 39(a) sessions is the government is obviously
18 doing more than just IDing *Brady*. They're IDing *Brady*, they're IDing
19 things that are material, and then they are redacting a lot of
20 things. So, it's not just a matter of looking at a piece of paper
21 and saying, "Okay, that's *Brady*, we've got to give it to them."
22 They're doing a lot more with this discovery than just IDing it as
23 *Brady*.

1 Now, there's no question the defense has access to the
2 discovery--or a lot of the discovery in this case; we have access.
3 The factor considered by the Courts is: is it equal access? And
4 it's very clearly not equal access; very clearly not equal access.
5 And one of the other factors considered by the Courts in the cases
6 the government pointed out--in several of those cases, they said,
7 "You don't need government--you don't need to identify this *Brady*
8 because you're already indexing this discovery when you give it to
9 the defense." We don't receive indexed discovery, we receive CDs
10 with a range of Bates numbers and then we have to figure out what's
11 on it. And so, we're not presented with, "Okay, Bates number, you
12 know, 1 to 100 is the CID file and 101 to 300 is this other file."
13 So, there's no indexing, here, going on and that's another factor the
14 Courts cited by the government looked to. How--what are you giving
15 the defense? I mean, here, we're getting discovery, but it's not
16 indexed; we have to figure out where things are.

17 And, finally, Your Honor, there is no authority--there is
18 no case law that says Your Honor has to do this. It's absolutely,
19 100 percent up to your discretion and we think that, under the
20 circumstances, that's an appropriate remedy.

21 MJ: All right. Thank you. Government, I do have a question:
22 the discovery that goes to the defense, its Bates number--is there

1 any other--is it just like one big dump and they've got to look
2 through it or is there some kind of an indexing?

3 TC[MAJ FEIN]: There's no indexing, Your Honor. We receive
4 documents--as they come in, we read the document, we put it through a
5 process to keep track of it by Bates number, and then we produce that
6 document in a PDF.

7 MJ: So, there's nothing that says, "Bates numbers 1 through
8 1005 is the CID report. Bates number 1005 through---

9 TC[MAJ FEIN]: The only thing that would exist, Your Honor, is
10 our work product from us going through it, too, in making that.
11 Sometimes documents do show up with file names, sometimes they don't.
12 Most of the file names have no meaning because, if it's a scanned
13 document, we just scan the documents in and then we process them and
14 then we keep our own--track of our own log. So, in the end, if we
15 were to give that information, we have literally done their job for
16 them because we don't receive--again, it's--this is----

17 MJ: Wait a minute, so you already have a working index of
18 what's where in the discovery?

19 TC[MAJ FEIN]: No, Your Honor, what we have is we've created our
20 own as we have reviewed documents, but we get a document, we put it
21 through our system, and then if it's something relevant, we then pull
22 it and then we index it that way. So, if we have, for instance, the
23 400,000 pages but only 10,000 we're going to use for, ultimately--or

1 500 for elements for Charge I and its specification, then we pull
2 those documents separately, we create our own internal process of
3 tracking those. But, as far as once we get information in and we go
4 through it, no, Your Honor, not at that point. We do have an
5 automated system, but it's--again, it's not based off file names or
6 what it is, it's based off the source of how we got the information
7 and then that's it.

8 MJ: So the source--I mean, do you have--I guess that's where
9 I'm confused. Is there any kind of an index at all that's
10 maintained? I'm not suggesting your index where your work product--
11 where you're basically organizing your elements, but there's nothing
12 that says, "All right, these are the following documents we got from
13 entities A, B, C, D, and E and they're located Bates number such and
14 such to such and such and such and such"?

15 TC[MAJ FEIN]: Your Honor, our automated system can do that
16 after we input that information. So, we have to review the document
17 and then we input that and now we have an index. So, what--I guess
18 where I'm drawing a distinction is we don't get the information and
19 somehow receive an index with it. We, internally, index documents
20 after we review them and that's what we work off of. So, if we were
21 to provide that index, we're providing the defense what we produce--
22 most of the information, we get it from emails. So, we, literally--
23 scans--we drag and drop it out of our email and then we put it into

1 our system, we review the document, we call it something, and then it
2 gets, for all intents and purposes, tagged a certain type of document
3 and then we decide if it's discoverable or not; if it is then we
4 produce a Bates number.

5 MJ: Okay.

6 TC[MAJ FEIN]: So, the index we produce is based off of our
7 review of the document. It is not some external index we receive so
8 we know what we're getting. We only get what we receive, based off
9 of the source. So, for instance, we just talked about the
10 Headquarters, DA response to our request. We got a bunch of CDs with
11 a heck of a lot of files, so we start putting those into our system,
12 and then we--once we start reviewing them and if something is
13 discoverable or not, we're going to produce it to the defense, we
14 figure that out and then we give it to the defense. And, at that
15 point, we also have to figure out what it is because it could range
16 from any type of document or information that you would have on your
17 computer.

18 MJ: So, when you give it to the defense, is it labeled
19 something like, "Here are the FBI files, here are such and such"?

20 TC[MAJ FEIN]: No, Your Honor, it's not, it's by Bates number.

21 MJ: Okay.

22 TC[MAJ FEIN]: Now, we do--when we give the information by Bates
23 number to the defense, we submit emails to them. We've given an

1 example in our response to the Court. We don't ID *Brady*, but we do
2 ID what type of information we're sending so there is context. We're
3 not just saying, "There's a CD in the mail. Good Luck." It's a CD
4 in the mail with these Bates numbers and here's the general
5 categories of information. So, it's--here is miscellaneous CID
6 documents received, some damage assessments and a report of some sort
7 and then here's the Bates range of what you're getting.

8 And again, that information is determined based off of our
9 own review of the information, Your Honor.

10 CDC[MR.COOMBS]: Your Honor, with regards to Major Fein's last
11 assertion that sending an e-mail telling the defense what's on a
12 particular CD they send me, that's happened on occasion, but that's
13 not the standard. In fact, their most recent email to me just
14 indicated they sent a CD to me and I asked, "What's the Bates range?
15 Can you tell me, generally, what's all on it?" I have received a
16 response to that, but there's been sometimes that, yes, the
17 government said, "Hey, we're sending you some stuff; it's going to be
18 FBI documents," or "We're sending you some stuff; it's going to be
19 damage assessments." And that's been what they've said, but often
20 times it's, "Hey, we sent you a CD, Bates number from this to this,
21 here's the tracking number," and then we'd receive it, I'd download
22 it, and I'd have to go through it and I've done my best to,
23 obviously, go through every page.

1 MJ: Okay.

2 TC[MAJ FEIN]: Your Honor, just to clarify, the one email that
3 he's talking about was sent, I think, on Monday for this motions
4 hearing and it was also from a previous email that said we're going
5 to be sending you this type of information and it was a damage
6 assessment that they affirmed. So, yes, we've probably--I would have
7 to look, then, but, as you'll see, we gave a sampling of the
8 different emails. An example is, "We placed the DVD in the mail,
9 today, containing unclassified discovery, Bates this range. This DVD
10 includes multiple pretrial confinement documents from the confinement
11 facilities. A copy is being delivered to Major Kemkes," is what we
12 do.

13 MJ: All right. Anything else we need to address today?

14 CDC[MR.COOMBS]: Nothing from the defense, Your Honor.

15 TC[MAJ FEIN]: No, Your Honor.

16 MJ: I do have one thing. The sentencing--I'm sorry, the
17 evidence that we discussed earlier for what the government was going
18 to use and not use for sentencing, when am I going to get to see
19 that?

20 TC[MAJ FEIN]: Your Honor, the--I think, from our perspective,
21 the outstanding question is the form or method form we submit to the
22 Court. The prosecution would offer we submit it *ex parte* under
23 701(g) (2) in order to show our work product and how we intend to

1 prosecute our case. It should be *ex parte* because it is our work
2 product.

3 MJ: Well, what about the 701(a)(5)? I mean, you're going to
4 have to disclose that at some point to the defense.

5 TC[MAJ FEIN]: Absolutely, Your Honor, but 701(a)(5) only
6 requires the documents that the government intends to use on
7 sentencing and---

8 MJ: Oh, so you're talking about your theory of the case?

9 TC[MAJ FEIN]: Yes, Your Honor, because, from the government's
10 perspective, the question from the Court was, ultimately, "What type
11 of evidence do you intend--does the government intend to use in
12 aggravation in order to assist the Court in making discovery
13 determinations on otherwise aggravating evidence. And so what the
14 prosecution argues is that we submit this under 701(g)(2), *ex parte*,
15 we give you the theory of the case, we can lay out the categories of
16 aggravation we intend to use and, even more importantly and probably
17 more helpful for the Court would be very specific categories and the
18 equity holder of those--of that information that we absolutely never
19 intend to use, based off how severe the damage was and how sensitive
20 it is can't be used in court.

21 MJ: All right.

22 CDC[MR.COOMBS]: On this--this was a discussion at the 802 and
23 this may be just the defense not understanding fully the Court's

1 request, but it was the evidence that the government intended to use
2 in its case-in-chief and on sentencing that would qualify as
3 aggravation evidence or evidence from these other entities so that
4 the Court could then look to see what is the government using and
5 what fairness should the defense receive. With regards to their
6 theory or their work product, the defense would concur that the
7 government doesn't need to tell us how they're going to try their
8 case, but with regards to the evidence they intend to produce, that
9 shouldn't be *ex parte*. If they, in fact, are saying that these are--
10 "This is evidence that we're trying to introduce on the merits, this
11 is the evidence that we're trying to introduce on sentencing," then
12 that shouldn't be *ex parte* because, then, we can argue why, based on
13 that information, the defense needs to see--let's say they're going
14 to offer the portion of some document they haven't shared with us
15 yet. That would be where the defense would say, "Well, in fairness,
16 we can't cross-examine whatever witness they're going to call or we
17 can't try to undercut whatever information or evidence they're trying
18 to introduce without having the ability to see the whole document.
19 So, again, this may be just the defense not understanding what the
20 Court wanted, but I would say that there would be two parts to this:
21 the government provides what information from these other agencies
22 they're going to offer, in merits and in sentencing, to both the
23 Court and the defense and, with regard to their theory, if they think

1 that's helpful, then, sure, let--they can file that *ex parte*; that's
2 not a problem.

3 With regards to other evidence that, because it's so
4 damaging, they never want to reference it, that really has nothing to
5 do with the information that we're looking at, then, at that point,
6 if that information really, truly does exist. So, the defense would
7 ask for clarification as to what the Court is wanting the government
8 to do and, at that point, the government can respond accordingly.

9 MJ: I asked the government to prepare the evidence that it was
10 going to--advise the Court the evidence that you are going to use in
11 sentencing and what you were relying on to do that and I would like
12 that in furtherance of my 505(g)(2) reviews. At this point, I'm
13 going to do it *ex parte*. I want to see it first before I make any
14 further determinations. And----

15 TC[MAJ FEIN]: Yes, Your Honor.

16 MJ: ----same thing for the ones you're not going to use.

17 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, if it may please
18 the Court, we could--we will--we can make the phone calls tomorrow
19 about approvals to provide the classified information in this regard.
20 I don't think that would be much of an issue and, hopefully, they'll
21 provide it by Friday so we can get an update posted by tomorrow
22 afternoon if we'll be able to get the approvals by Friday.

1 MJ: Actually, let me ask you one more question: the government
2 has already submitted a motion to preclude mention of actual damage
3 on the merits.

4 TC[MAJ FEIN]: Yes, Your Honor.

5 MJ: I have that motion, I've taken it under advisement, and I
6 planned to ask this at the end of this Article 39(a) session, but
7 I'll ask it now and maybe it's something we can address at the next
8 session, but I would like more targeted briefs from the parties on
9 that issue, primarily with respect to what the defense said they were
10 going to use the information for and, particularly, with response to
11 the example that you gave me on "assault with a means likely." In
12 that kind of scenario, potential could be would look at the injury to
13 the person to see if the fists caused that injury and what I'm
14 looking for is case law, one way or the other, ideally, on the
15 offenses at issue, but, if not, on similar type offenses. I didn't
16 see anything in the submissions on either side that really addressed
17 that issues, so, if I could--if you could do a little more digging
18 and see if there is anything out there, basically, on the result of
19 the--what happened being relevant to what could happen.

20 TC[MAJ FEIN]: Your Honor, may we docket that for the next
21 motions hearing?

22 MJ: Yes, yes, I'm not suggesting we're going to do it this
23 time, but I think that would allow the Court to make a more informed

1 decision. That said, is the government, since you precluded mention
2 of that actual damage in the merits, is the government making--
3 planning on introducing any actual damage evidence on the merits?

4 TC[MAJ FEIN]: No, Your Honor, none.

5 MJ: Okay.

6 TC[MAJ FEIN]: But, Your Honor, may I clarify--from the
7 perspective of damage assessments, then no, but depending on the
8 definition of damage, we do have to prove prejudice to good order and
9 discipline and service discrediting so it could be conceived of
10 immediate damage on a unit or perceptions of the Army or the unit
11 that could be--that could fall under the umbrella of damage. So, for
12 clause one--two of Article 134, what would be, normally, in any other
13 court-martial, then, yes, but not damage from damage assessments that
14 would go to actual harm of national security.

15 MJ: Okay.

16 TC[MAJ FEIN]: So, definitely, will include that in our brief.

17 MJ: All right. Anything else we need to address before we
18 recess the Court?

19 CDC[MR.COOMBS]: Nothing from the defense, Your Honor.

20 TC[MAJ FEIN]: No, Your Honor.

21 MJ: All right. Court is in recess. We're going to start at
22 0900 as opposed to 1000 tomorrow morning because we have some
23 witnesses that will be coming in. Court is in recess.

1 [The Article 39(a) session recessed at 1746, 6 June 2012.]

2 [END OF PAGE]

Pages 798 through 822 of this transcript are classified “TOP SECRET”. This session (6 June 2012, Session 1) is sealed for Reasons 1 and 4, Military Judge’s Seal Order dated 17 January 2014 and is stored at the Office of the General Counsel, Central Intelligence Agency.

1 [The Article 39(a) session was called to order at 0917, 7 June 2012.]

2 MJ: This Article 39(a) session is called to order. Let the
3 record reflect all parties present when the Court last recessed are
4 again present in court. I believe--is there someone missing from
5 trial counsel table?

6 TC[MAJ FEIN]: No, Your Honor.

7 MJ: All right. As I understand, we are prepared to proceed
8 today. Do we have witnesses that are available to testify from the
9 Department of State?

10 TC[MAJ FEIN]: Yes, Your Honor, there are two in-person-in-court
11 testimony--individuals ready to testify for the defense.

12 MJ: All right. Are both sides ready to proceed with that
13 testimony?

14 CDC[MR.COOMBS]: Yes, Your Honor.

15 TC[MAJ FEIN]: Yes, Your Honor.

16 MJ: Please call witnesses.

17 CDC[MR.COOMBS]: Defense would call Ms. Margaret [sic] Coffey.

18 [END OF PAGE]

1 MARGUERITE COFFEY, civilian, was called as a witness for the defense,
2 was sworn, and testified as follows:

3 DIRECT EXAMINATION

4 Questions by the trial counsel [MAJ Fein]:

5 Q. For the record, Ms. Coffey, are you Ms. Marguerite Coffey,
6 the former Director of the Office of Management, Policy, Rightsizing,
7 and Innovations----

8 A. I am.

9 Q. ----for the Department of State? Thank you. And also, Ms.
10 Coffey, just as a reminder, if you feel an answer requires a
11 classified answer, please notify the Court.

12 A. Certainly.

13 Q. Thank you.

14 Questions by the civilian defense counsel [MR. Coombs]:

15 Q. Good morning, Ms. Coffey.

16 A. Good morning.

17 Q. I'm going to ask you a few questions. If, at any time, you
18 don't understand my question, just ask me to rephrase it----

19 A. Certainly.

20 Q. ----and I'll be happy to do so. I don't anticipate any of
21 my questions to require you to reveal any classified information,
22 but, again, as Major Fein indicated, if you think that would be the
23 case, just alert me and the Court and we'll act accordingly. Okay?

1 A. Certainly.

2 Q. My understanding is you've been with the Department of
3 State since 1978?

4 A. That's--well, 1979. I've been with the United States
5 government since 1978.

6 Q. Okay. Can you tell the Court a little bit about what
7 you've done? I know you've had several positions, but your general
8 background with the Department of State.

9 A. Well, when I began, I was a Presidential management intern.
10 I worked in the Bureaus of Administration, Consular Affairs,
11 Diplomatic Security, Information Technology, Management Policy, and
12 then the Office of Management Policy, Rightsizing, and Innovation.

13 Q. And, currently, more in an advisory role, at this point,
14 with the Department of State?

15 A. That's correct, I'm a part-time employee.

16 Q. And what do you do in that role?

17 A. Well, I work on special projects and I was informed, at the
18 beginning of this week, that I would be testifying at this hearing
19 today.

20 Q. Okay. So, was that one of your special projects that you
21 got informed of?

22 A. It wasn't at the time, but it is now.

1 Q. Okay. Well, we'll confer to the Courtroom for that. All
2 right, I'd like to ask you about your knowledge with regards to what
3 the Department of State has done in relation to the leak of the
4 department cables, okay?

5 A. Yes.

6 Q. Are you familiar with some of the steps the Department of
7 State has taken, based upon the disclosure of diplomatic cables?

8 A. Yes.

9 Q. And how so?

10 A. Well, in the summer of 2010, there were a series of cables
11 that went out to posts from the Undersecretary for Management,
12 Patrick Kennedy, that advised them of the WikiLeaks disclosure and
13 asked them to make sure that procedures were in place. These are
14 things, not only on the management side, but on the policy side of
15 familiarizing themselves with cables from the Net-Centric Diplomacy
16 cable feed which was the source of the information.

17 Q. And the Net-Centric Diplomacy cable feed, those were the
18 SIPDIS cables?

19 A. That's correct.

20 Q. And for SIPDIS, that meant cables were able to be shared on
21 the SIPRNET. Is that correct?

22 A. Yes.

1 Q. Now, my understanding is that the Department of State has
2 certain tags that they place on cables, basically controlling the
3 distribution of those cables; is that----

4 A. That's correct.

5 Q. ----correct? And SIPRNET would be one of those tags--or
6 SIPDIS?

7 A. SIPDIS would, yes.

8 Q. SIPDIS cannot be used with other tags, correct?

9 A. I'm not sure that.

10 Q. If they--you had a more restricted distribution tag along
11 with--well, actually, if you had a more restricted distribution tag,
12 it would not be something that would be put into SIPDIS, is that
13 correct?

14 A. I'm not sure of that because I don't think I've prepared a
15 cable, myself, and used tags, personally, in about 10 to 15 years.

16 Q. And, obviously, that's changed over a period of time?

17 A. It very definitely has.

18 Q. All right. Going back to the Department of State actions
19 in relations to the leak of cables, do you know what they--the
20 Department of State did with regards to any sort of damage assessment
21 of the cables?

22 A. In November of 2010, instructions came from the Office of
23 Management and Budget--I believe it was late in November--that asked

1 federal agencies to review their procedures in place and make sure
2 that the security safeguards for electronic information and all
3 information were what they needed to be and to do the due diligence
4 that management would do in the areas of security, information
5 assurance, and policy of what pertained to information management in
6 the department and we proceeded to do that.

7 Q. Do you know that the Department of State has provided a
8 copy of its damage assessments the Court?

9 A. I don't know so----

10 Q. Have you seen the Department of State's damage assessment?

11 A. No, I haven't. -

12 Q. Are you familiar when that damage assessment might have
13 been completed?

14 A. No, I'm not.

15 Q. And you indicated--and you know Ambassador Patrick Kennedy--
16 ---

17 A. Yes.

18 Q. ----apparently? Do you know that he testified in front of
19 the Senate Committee on Homeland Security and Government Affairs in
20 March of 2011?

21 A. Yes.

22 Q. And, at that hearing, he testified about some of the steps
23 that the Department of State had taken any became aware of the fact

1 that WikiLeaks had, potentially, some of the Department of State
2 cables?

3 A. Yes.

4 Q. And he talked about various organizations that were
5 created: the Chiefs of Mission Review?

6 A. Yes.

7 Q. Are you familiar with that?

8 A. I am.

9 Q. And how are you familiar with the Chiefs of Mission Review?

10 A. I knew that it was being conducted in the department, but I
11 did not participate in that review.

12 Q. And, just in general, can you tell the Court what you know
13 of regard to the Chiefs of Mission Review?

14 A. My understanding was that Chiefs of Mission, or ambassadors
15 in our posts abroad, were asked to conduct a review of the foreign-
16 policy implications of any disclosure of information via the
17 WikiLeaks and Net-Centric Diplomacy feed.

18 Q. And, again, knowing that you were really involved in that,
19 are you aware of whether or not the Chiefs of Missions complied with
20 that request?

21 A. No, I'm not.

22 Q. So, you've never seen any kind of----

1 TC[MAJ FEIN]: Your Honor, objection, this witness, based off
2 the defense is request, was offered for the mitigation team. The
3 witness just testified she doesn't have direct knowledge about these
4 Chiefs of Mission Review and there is a Department of State witness
5 coming to testify on that subject.

6 CDC[MR.COOMBS]: Again, Your Honor, I'm just asking the witness
7 what she knows, I'm not--if she says she doesn't know something,
8 I'll--I'm moving on to other topics.

9 MJ: All right. Go ahead. Overruled.

10 **Questions continued by the civilian defense counsel [MR. Coombs]:**

11 Q. So, you haven't seen anything from the Chiefs of Missions
12 Review?

13 A. I have not.

14 Q. The 24/7 WikiLeaks Working Group, are you familiar with
15 that?

16 A. Yes.

17 Q. And can you tell the Court how you familiar with that?

18 A. Well, that was stood up in response to the disclosures as
19 well, but that was another area that was outside the scope of my
20 responsibilities and so I had no involvement in their operations as
21 all.

22 Q. So you never saw anything from 24/7 WikiLeaks Working
23 Group?

1 A. No.

2 Q. And you never participated in any meetings discussing the
3 24/7 WikiLeaks Working Group?

4 A. No.

5 Q. Thank you, ma'am. Persons at Risk Group, are you familiar
6 with that group?

7 A. Yes.

8 Q. And can you tell the Court how you're familiar with that?

9 A. It was another group that was stood up in the aftermaths of
10 the WikiLeaks disclosures and, again, it was something that I was
11 aware of but had no part in the deliberations nor did I see any of
12 their product.

13 Q. And when you say you're "aware of," can you tell the Court
14 how, generally, you became aware of that group?

15 A. Certainly. In the fall of 2010, these various groups--I
16 believe this is in the November timeframe--these various groups were
17 tasked by the department to look into various aspects of the
18 WikiLeaks disclosures. And, for example, my role was to stand up the
19 mitigation team and what we were mitigating were any shortcomings or
20 any deficiencies to the management operations pertaining to systems
21 security, information management, and the development of information
22 management policy and that was the area in which I operated during
23 this time.

1 Q. So with regards to the other groups, you were just simply
2 aware of their existence but there was no kind of cross-pollination
3 of efforts or information?

4 A. There was not.

5 Q. Are you aware of any of the Department of State's briefings
6 to Congress or the Senate other than, I guess, Ambassador Kennedy's
7 briefings?

8 A. I was aware of Ambassador Kennedy's briefings in late
9 November and early December of 2010.

10 Q. Any other briefings by Department of State members?

11 A. Undersecretary Kennedy briefed the Senate Government
12 Affairs Committee on March 10th, 2011.

13 Q. In the late November, early December--was that also
14 Ambassador Kennedy?

15 A. Yes.

16 Q. And, as you just stated, the Mitigation Team was one of the
17 teams that the Department of State created?

18 A. Yes.

19 Q. And my understanding, from Ambassador Kennedy's testimony,
20 is that was to address the policy, legal, security,
21 counterintelligence, and information assurance issues presented by
22 the release of these documents?

23 A. Correct.

1 Q. How many members--well, actually, you said you led the
2 Mitigation Team?

3 A. Yes, I did.

4 Q. How many members comprise the Mitigation Team?

5 A. It varied at times. I think the first meeting that we had
6 were probably five assistant secretaries or deputy assistant
7 secretaries, the chief information officer, the Bureau of Diplomatic
8 Security, the Bureau of Administration, all those that had the
9 operational responsibility over the areas that you've just
10 identified.

11 Q. And when was your group created?

12 A. It was, I believe, in late November--it was either right
13 before or right after Thanksgiving of that year.

14 Q. 2011?

15 A. 2010.

16 Q. 2010? And I know, ma'am, that you're now in an advisory
17 role, but is that group still conducting its work?

18 A. I don't know. I would be surprised if it was because,
19 basically, what we did was the due diligence that OMB asked us to do
20 within the timeframe they asked us to do it and what we recorded was
21 recorded in Undersecretary Kennedy's testimony on March 10th.

22 Q. Okay. So, let's go through some of the stuff, then. What
23 did the group look at regards to policy in general? Not releasing

1 any classified information, but what were you looking at with regards
2 to policy?

3 A. Information assurance, information management--this is--
4 were our policies on disclosure of information up to date, the
5 various means through disclosure, for example. I don't think, at the
6 time, in the Foreign Affairs Manual, which is our regulation--in-
7 house regulations, I don't think the manual contained a word such as
8 "thumb drive," but it does now. So, we were nipping and tucking, if
9 you will, updating all of those policies to comport with that year.

10 Q. For the information assurance aspects, we're also looking
11 at just the very nature of the Net-Centric Diplomacy---

12 TC[MAJ FEIN]: Your Honor, objection. Again, this line of
13 questioning is outside the scope. The purpose the defense requested
14 the Court ordered this witness for was to develop and determine what
15 documentation exists a motion to compel discovery. What conclusions
16 they might have come to is not the documentation. If there is
17 documents, they could request the Court to order production of these
18 documents and then those--where the conclusions would come from.

19 MJ: What prejudice is there for the government if I allow this
20 line of questioning to continue?

21 TC[MAJ FEIN]: Your Honor, the first prejudice is that the
22 original scope was for Ms. Coffey to come and testify about what the
23 Mitigation Team did and what documents were there. Ms. Coffey isn't

1 even in the position to--she's the former director--isn't even in the
2 position, right now, to give the exact conclusions without at least
3 having the ability to prepare first. So, in order to give the
4 defense and the Court, ultimately, these answers, this is out the
5 scope of what she anticipated to coming here to testify.

6 MJ: Ms. Coffey, if there are any questions thank you believe
7 that you're not prepared to answer or that you, at least, don't want
8 to answer, please advise me. Go ahead and proceed.

9 WIT: Yes, Your Honor.

10 CDC[MR.COOMBS]: Thank you.

11 **Questions continued by the civilian defense counsel [MR. Coombs]:**

12 Q. So, Ms. Coffey, with regards to information assurance, did
13 your team look at the Net-Centric Diplomacy Database in general--the
14 idea that SIPDIS cables?

15 A. I don't know, but my understanding of the scope of their
16 work was that they were to do a complete review of the State
17 Department's network.

18 Q. Okay. And so, with regards to policy, that was a subgroup
19 of your Mitigation Team, correct?

20 A. Correct.

21 Q. And, at the time that you left, was there--actually, when
22 did you leave supervising this group?

23 A. On the 29th of July 2011.

1 Q. At the time that you let supervising this group, was it
2 still continuing its work or was the group basically disbanded at
3 that point?

4 A. To my recollection, the group--once it formally disbanded,
5 but met sporadically after Undersecretary Kennedy's testimony on
6 March 10th. At that point, the focus became in the interagency work
7 that was being coordinated by the National Security Council.

8 Q. Do you know if you were replaced? If you were the
9 supervisor on the Mitigation Team, did somebody replace you?

10 A. Oh, yes.

11 Q. And you know who that is?

12 A. My deputy, Ms. Kay Gotoh.

13 Q. Gotoh?

14 A. G-O-T-O-H.

15 Q. And, in the military, we do kind of like what's called a--
16 like a "Right-Seat-Right" where you hand over responsibilities and
17 the person might shadow you for a short period of time. Did Ms.
18 Gotoh do that?

19 A. Yes.

20 Q. And, during the time period, did you tell her there was any
21 outstanding things that Mitigation Team needed to accomplish?

22 A. Note.

1 Q. So, at least as of 29 July 2011, from your perspective, the
2 Mitigation Team had completed its work?

3 A. Oh, yes.

4 Q. What did the group look at with regards to the legal
5 aspects?

6 A. Well, part of the Mitigation Team include the Office of the
7 Legal Adviser. There is a deputy legal adviser for management that
8 was part of the team and they participated and advised on various
9 points of regulation during the period we convened, they advise, of
10 course, on the testimony and anything--any other questions that the
11 group may have had.

12 Q. And when you say, "testimony," what do you mean, ma'am?

13 A. That was Undersecretary Kennedy's testimony before the
14 Senate Government Affairs Committee on March 10th.

15 Q. All right, so the scope of this testimony?

16 A. Correct.

17 Q. And with regards to you leaving the group on 29 July 2011,
18 I take it there were no outstanding legal issues either at that time?

19 A. Not to my knowledge.

20 Q. And what the group look at with regards to the
21 counterintelligence?

22 A. The counterintelligence area was the counterintelligence
23 area within the Bureau of Diplomatic Security and they were focused

1 on--with respect to their work on the mitigation team--issues of
2 access to information systems and whether or not the--not only were
3 the regulations up to date, but was there any evidence on the network
4 that there were any anomalies with network operations at any time.

5 Q. Okay. So, the access part, is that the access to the Net-
6 Centric Diplomacy database that you were talking about?

7 A. Well, not during that period of time because access to the
8 Net-Centric Diplomacy database had been drawn down as a result of the
9 disclosure of the WikiLeaks leak.

10 Q. And so, at that point, it was only available on JWICS?

11 A. That's correct.

12 Q. So, prior to that being available on SIPRNET, from your
13 understanding, was there any sort of password or any sort of
14 requirement other than SIPRNET access to get to the Net-Centric
15 Diplomacy database?

16 A. I'm not aware of that.

17 Q. Did your group--was your group the one that made the
18 recommendation, I guess, to move it to JWICS or was that done
19 independently of your group?

20 A. Was done independently. In fact, it was done before the
21 Mitigation Team ever convened.

22 Q. You might have already covered this, ma'am, the information
23 assurance issues--we discussed a little bit of them, but the group

1 had an independent duty, apparently, to look into the information
2 assurance issues. What, in general, did you look at with regards to
3 that?

4 A. Again, network security to do all the due diligence and
5 review all of the protocols for network access and network
6 operations.

7 Q. Was this information assurance aspect just from the
8 Department of State perspective or was this information assurance
9 from the standpoint of access to the Net-Centric Diplomacy?

10 A. I think it was both.

11 Q. And I understand you're in an advisory role so, you, at
12 this point--so you may say, "I have no knowledge of this," but do you
13 know if Ms. Gotoh and their group conducted any additional reviews of
14 information after 29 July 2011?

15 A. I have no knowledge of that.

16 Q. Now, when WikiLeaks released all of the unredacted cables
17 on 1 September 2011, do you know if anything was done by the
18 Mitigation Team at that point?

19 A. That date was after my participation in the--you said 2011?

20 Q. That's correct. So, I know you're no longer as the
21 supervisor, I'm just wondering do you know if the mitigation team did
22 anything after that?

23 A. I don't.

1 Q. At the time that the mitigation team that you were
2 supervising was looking information, the cables had not been released
3 in redacted form, correct?

4 A. Correct.

5 Q. And what cables--were you looking at any of the cables from
6 your perspective as the Mitigation Team?

7 A. No. I, personally, did not see any of those cables.

8 Q. The group that you supervise, did it submit a final report
9 in some format?

10 A. No, we reported to the Congress on March 10th, 2010 on what
11 measures were taken by the mitigation team and others to strike the
12 right balance as the committee was concerned about the need to share
13 information and the need to safeguard it in a manner consistent with
14 national security directives.

15 Q. Did the Mitigation Team ever produce anything in written
16 form?

17 A. The testimony.

18 Q. Just the testimony of Ambassador Kennedy?

19 A. Correct.

20 Q. So, other than that, the Mitigation Team never compiled
21 anything into a written document?

22 A. What we had and what we based the testimony on were meeting
23 agendas and meeting minutes and the discussions in those meetings,

1 which were weekly, about the measures taken to mitigate all of the
2 operational managerial efforts that were directed by the Office of
3 Management and Budget.

4 Q. So, the Mitigation Team, basically, from November 2010 to
5 the time period that you left in July of 2011, met on a weekly basis?

6 A. We met on a weekly basis up to about the time right after
7 Undersecretary Kennedy's testimony. After that, we started meeting
8 every other week, so it was bi-weekly and our focus started to change
9 to the interagency community.

10 Q. All right. So, weekly basis up until about March of 2011--
11 --

12 A. Yes.

13 Q. ----and then bi-weekly after that?

14 A. Correct.

15 Q. And you said that meetings were captured by meeting notes
16 or agendas?

17 A. Correct.

18 Q. And was this documentation preserved in any way?

19 A. Yes.

20 Q. And how so?

21 A. Well, it's in a file and what used to be my former office
22 and I don't have access to it, I don't know if it still exists, but
23 it did from the time that I was the director of that office.

1 Q. And, I take it, at least from my experience with meeting
2 notes, you have one person that's like the transcriber who takes down
3 the notes of the discussion?

4 A. Correct.

5 Q. Denote that person was for your committee?

6 A. Yes.

7 Q. Can you tell me that person was?

8 A. Eric Stein.

9 Q. Is Mr. Stein still with the Department of State?

10 A. Yes, he is.

11 Q. Now, you testified that the Mitigation Team's assessment,
12 apparently, is incorporated into Ambassador Kennedy's testimony,
13 correct?

14 A. That's correct.

15 Q. But you have no knowledge of whether or not the Mitigation
16 Team's efforts were as incorporated into the Department of State's
17 damage assessment?

18 A. I have no knowledge of that.

19 Q. And, understanding that you were not part of the creation
20 of the damage assessment, do you have any knowledge as to how the
21 damage assessment was created by the Department of State?

1 answered that when he asked you about the damage assessment. Is that
2 OMB directive about the damage assessment or mitigation efforts?

3 A. Mitigation efforts.

4 Q. Okay. And then also, could you briefly explain for the
5 Court the structure or organization of the Department of State?

6 A. Sure. Well, of course, it's a cabinet department. It is
7 led by the Secretary of State, it has two deputy secretaries of
8 state, and six under secretaries of state, and if I can make an
9 analogy to simplify things, I think you could equate the
10 undersecretaries of state--there are six of them--with the joint
11 chiefs at the Pentagon and that each of them have their individual
12 portfolios and each of them are certainly aware of one another's
13 mission, but they don't really deal with one another's day-to-day
14 operations.

15 Q. And does the Department of State, as a department, have a
16 centralized filing system?

17 A. It does. It captures the official records of the Secretary
18 of State which, of course, are managed by the Bureau of
19 Administration, in cooperation with the National Archives and they
20 are of obvious historical interest and, ultimately, find their
21 expression 30, 40, 50 years down the road in the foreign relations of
22 the United States which is of great value and use to historians.

1 Q. So that system you're talking about is really only for the
2 secretaries papers?

3 A. That's correct.

4 Q. It's not for all the employees or offices or bureaus with
5 the department?

6 A. That's correct, everybody else follows the record
7 management procedures of the National Archives and every 3 years,
8 according to schedule, we organize our records and retire them
9 according to what the National Archives requires.

10 TC[MAJ FEIN]: Thank you. There are no further questions, Your
11 Honor.

12 MJ: Anything further from the defense?

13 CDC[MR.COOMBS]: Just briefly.

14 **REDIRECT EXAMINATION**

15 **Questions by the civilian defense counsel [MR. Coombs]:**

16 Q. On the agenda notes--ma'am, I realize you said you're not
17 aware of whether or not they still exist, as it will to preserve the
18 agenda and meeting notes of meetings?

19 A. Yes.

20 Q. And how is that normally done?

21 A. Well, they would be an electronic record and they would
22 still be part of the files of the Office of Management, Policy,
23 Rightsizing, and Innovation.

1 Q. So, you would expect, if a request was made to obtain the
2 agenda notes and meeting notes from the mitigation team, that the
3 Department of State would actually have those documents?

4 A. I would expect that, yes.

5 CDC[MR.COOMBS]: Thank you, ma'am.

6 WIT: You're welcome.

7 MJ: Any follow-up from the government?

8 TC[MAJ FEIN]: No, Your Honor.

9 [The witness was excused and withdrew from the Courtroom.]

10 CDC[MR.COOMBS]: Ma'am, the defense would call Ms. Rena Bitter.
11 RENA BITTER, civilian, was called as a witness for the defense, was
12 sworn, and testified as follows:

13 DIRECT EXAMINATION

14 Questions by the trial counsel [MAJ Fein]:

15 Q. And for the record, you are Ms. Rena Bitter, the Director
16 of the Operations Center at the Department of State?

17 A. Uh-huh.

18 Q. Thank you. And before we continue, just as a reminder, if
19 you feel any answer requires a classified answer, please notify the
20 Court.

21 A. I will do, thank you.

22 Q. Thank you.

1 Questions by the civilian defense counsel [MR. Coombs]:

2 Q. Good morning, Ms. Bitter.

3 A. Good morning.

4 Q. Thank you for taking the time to come here today to
5 testify. Can you tell the Court how long you've been in your current
6 position as the Director of Operations Center?

7 A. Two years, almost.

8 Q. And how long have you been with the Department of State?

9 A. 18 years.

10 Q. And, briefly, can you tell the Court some of the previous
11 positions that you've held with the Department of State?

12 A. I've served in embassies overseas in Mexico City, Bogotá,
13 London, and Amman, Jordan and I've also worked at various jobs in the
14 department.

15 Q. And your overseas positions, what, in general, was your
16 position?

17 A. I worked in Amman as the Chief of the Consular Section at
18 the embassy; it's part of the embassy that provides public services.
19 And, in London, I served as the Chief of the Non-Immigrant Visa
20 Section and, prior to that, I was a political officer.

21 Q. Thank you. With regards to your current position, what
22 does the Director of Operations Center do?

1 A. The Operations Center is the State Department's briefing
2 and crisis management center; we're bureaucratically located in the
3 office of the secretary and we're--a big piece of what we do is we
4 coordinate the State Department's response to a crisis.

5 Q. So, is that a public statement-type response by the
6 Department of State, or is that just coordinating how the Department
7 of State should handle something internally?

8 A. Well, like--I'm sure like DoD and other agencies there are
9 lots of different pieces of the State Department that do different
10 things. When there is a crisis, it's incumbent upon the Operations
11 Center to make sure that everybody has--sort of speaks with one voice
12 in terms of a crisis, so it involves all parts of the department,
13 including the public affairs section and other pieces. So, all parts
14 of the department that are touched by crises will participate in the
15 response that we coordinate.

16 Q. So when a member of the Department of State makes a public
17 statement such as Ambassador Kennedy or somebody else, that's
18 something that has been coordinated through your Operations Center?

19 A. No, generally not; that would be through the public affairs
20 section. We--what we do is when there is, like, an on-going crisis,
21 we'll bring together all of the people in the department that have a
22 role in it on a task force working group so they can all work
23 together in one location and coordinate with each other. Something

1 like a public statement or testimony elsewhere can be handled by
2 individual offices and bureaus.

3 Q. So, the Operations Center, basically, just supervises ad
4 hoc groups that have been created in response to some emergency or
5 crisis?

6 A. Yeah, what will happen is the--what ordinarily happens is
7 where--the Executive Secretary is the head of--we work for him and
8 his job is--I don't mean to put it in sort of very simple terms--he's
9 the assistant secretary for making the State Department do with the
10 secretary needs it to do. So, when there's a big crisis that
11 involves a lot of different parts of the department, he will ask the
12 building--he will task the building and the various bureaus in the
13 building to provide representatives to a task force or working group
14 and that provides the response to the crisis--that formulates the
15 response to the crisis. And that group is stood up under the
16 auspices of my office, the Operations Center.

17 Q. Okay. So, ma'am, when you say "he," is that Ambassador
18 Kennedy? Is that the person?

19 A. No, it's Ambassador Mull.

20 Q. Can you say that name again?

21 A. Ambassador--the current Executive Secretary of the
22 Department of State is Stephen Mull.

23 Q. And, I'm sorry, can you spell the last name?

1 A. M-U-L-L. But, again, he's the current Exec-Sec; that's,
2 sort of, bureaucratically--whoever is in that job will do that.

3 Q. And can you tell me who was in that job in the 2010-2011
4 time frame?

5 A. It was Ambassador Mull.

6 Q. Based upon your position in the last two years as the
7 Director of Operations Center, are you knowledgeable with regards to
8 the Department of State's reaction--when it's done in reaction to
9 this disclosure of diplomatic cables?

10 A. Our office coordinated the crisis response in the immediate
11 aftermath.

12 Q. So, that would be, yes, you're familiar with what the
13 Department of State has done?

14 A. I'm familiar with what my office did.

15 Q: Okay. And can you, generally, tell us, once the Department
16 of State was made aware of the fact that some of its cables from the
17 Net-Centric Diplomacy database may have been compromised, what did
18 the Department of State do?

19 A. As I was saying, we did what we typically do in response to
20 crises that touch on various bureaus in the department and reforms
21 the WikiLeaks Working Group under the auspices of my office.

22 Q. Is that all that the Operations Center did?

1 A. That was the primary vehicle for responding to the crisis
2 that I--I can't think of anything else that might respond to that
3 question.

4 Q. And before I talk about that, from your position, are you
5 familiar with the Department of State's damage assessment?

6 A. I'm aware of it, but I'm not familiar with it.

7 Q. Do you know that the Department of State has provided its
8 damage assessment to the Court and the parties?

9 A. I don't know.

10 Q. Have you ever seen the Department of State's damage
11 assessment?

12 A. I have not.

13 Q. So, can you tell us how you--when you say, "I'm generally
14 aware," to what extent are you aware of the damage assessment?

15 A. I know, in talking to--in preparing for this, that that was
16 a topic that was--that had come up and I--it wasn't a surprise to me,
17 so I can't tell you exactly how I know about it, but I knew it was
18 sort of out there.

19 Q. So you have no knowledge as to what might be the latest
20 damage assessment by the Department of State or anything like that?

21 A. I do not.

22 Q. Do you know Ambassador Kennedy?

23 A. Yes, I do.

1 Q. And are you familiar with the fact that he testified in
2 front of the Senate Committee on Homeland Security and Government
3 Affairs?

4 A. I'm aware that he testified, yes.

5 Q. And, from your knowledge, do you know when he testified?

6 A. I do not; I don't remember.

7 Q. Does March 2011 sound about right?

8 A. It does sound right from, again preparing for this since it
9 sounded--that I heard mentioned.

10 Q. Now, I realize that you have received short notice that
11 you're going to be testifying here today---

12 A. Uh-huh.

13 Q. ----so if there's something you don't recall or you don't
14 remember, it's perfectly fine for you saying, "I don't recall or I
15 don't remember."

16 A. Thank you.

17 Q. So, when Ambassador Kennedy testified, he mentioned several
18 groups and one of them was the WikiLeaks Working Group.

19 Q. Uh-huh.

20 Q. Are you familiar with the general content of his testimony
21 in front of the Senate?

1 A. I know that he testified and, again, the last few days I've
2 become aware a little bit more, but I didn't follow it and I haven't
3 read it they don't really know what he said.

4 Q. Okay. But he testified, he indicated that once the
5 Department of State became aware of the fact that certain cables had
6 been, potentially, compromised, the Department of State took several
7 immediate actions and one of them was creating the 24/7 WikiLeaks
8 Working Group. To your knowledge, when did that group start its job?

9 A. That started the last week of November of 2010. I think it
10 might've been 26th of November.

11 Q. And, according to Ambassador Kennedy, the WikiLeaks Working
12 Group was composed of senior officials from throughout the
13 department?

14 A. Uh-huh.

15 Q. To include your regional bureaus as well?

16 A. Uh-huh.

17 Q. And who were the senior officials, in general?

18 A. In general, they were--it was composed, initially, of--
19 because it was 24/7, there was not just one representative from each
20 bureau, but it was composed of one representative from, essentially,
21 several bureaus that rotated on various shifts and each bureau--each
22 regional bureau, in particular, had somebody at the Deputy Assistant

1 Secretary-level that took responsibility as well for being present
2 part of the time.

3 Q. And can you tell the Court and educate the Court and myself
4 on the regional bureau's--like how----

5 A. Sure.

6 Q. What does that mean and who is in a regional bureau?

7 A. The State Department is--and I think DoD is probably
8 divided about the same way--is separated into regional bureaus and
9 then also functional bureaus. And the regional bureaus represent--
10 it's divided by various parts of the world. So, it's East Asia
11 Pacific Affairs and Western Hemisphere Affairs, European Affairs, all
12 the way across--I think we have seven regional bureaus. And then
13 there are a variety of functional bureaus to handle issue-based
14 problems--or issues, essentially, like refugees and human rights,
15 international organizations, and things like that. Public Affairs is
16 one as well.

17 Q. Okay. And the fact that the working group was 24/7, you
18 indicated that multiple people from, maybe, the same bureau were
19 tasked to be part of the group?

20 A. Right.

21 Q. And what was the size of the group, in numbers?

22 A. By bureau or by persons?

1 Q. Let's first go by the WikiLeaks Working Group, in general.
2 Like how many people were within the 24/7 WikiLeaks Working Group?

3 A. I can't remember, exactly, how many bureaus are
4 represented, but he probably had, at any given time, representation
5 from 10 bureaus or 15--actually probably closer to 15.

6 Q. And so 15 bureaus--would that mean 15 people or 30 people
7 or 40 people?

8 A. If they--we--the way that we structured it was a little
9 unusual for us. Normally, it's just one representative from each
10 bureau, but during the day, in particular, at the beginning, we had
11 two representatives from some of the bureaus. So, it would have
12 probably been 25 people, I would say, during the day and then in the
13 swing shift and overnight shift we would have had fewer people.

14 Q. Okay. Now, I have a few more questions on the working
15 group, but I understand, based upon representation, that you also
16 participated in a group that was tasked to review potential risks to
17 individuals based upon the release of the cables?

18 A. Yes.

19 Q. And what was that group called?

20 A. That was the WikiLeaks Persons at Risk Working Group.

21 Q. All right. So--actually, let's go ahead and discuss these
22 in turn. What was the general task and purpose of the 24/7 WikiLeaks
23 Working Group?

1 A. It was to formulate a State Department response and,
2 essentially, what it was--we were trying to get--the goal of that
3 particular working group was to stay ahead of the release of
4 information of purported cables and to try to make sure that we could
5 understand what was public and make sure that State Department
6 officials were aware of what was--what information had now become
7 public and what they might have to respond to. At the time in
8 particular, it was important because the secretary was traveling
9 overseas and she was traveling and seeing a variety of different
10 interlocutors and she was seeing folks at a particular multilateral
11 event where she would have run into a lot of her counterparts. So,
12 it was very important that the group stay ahead and on top of what
13 was public and be able to make the secretary and other department
14 officials aware.

15 Q. All right. And so, the group was looking at the cables
16 that had been released that far--at that point or were they looking
17 at all the cables they thought were compromised?

18 A. The group did both. The group was aware of the database of
19 the universe--of actual information that may have been compromised
20 and that was also looking at the purported cables that were, then, in
21 the public domain.

1 Q. All right. So, the 24/7 WikiLeaks Working Group looked at
2 all the cables that were within the Net-Centric Diplomacy database
3 that were believed to have been compromised?

4 A. I mean--they--it was not the job of the working group to
5 become familiar with that body of information, but there were
6 instances where it was important for them to be able to access that
7 body of information. The real purpose of the group was to stay ahead
8 of public disclosures.

9 Q. And when you say, "stay ahead," what does that mean?

10 A. To become aware, as quickly as possible, when something
11 became--something that was purported to be a State Department cable
12 became public and to draw to the attention of all the people who
13 might need to take a look at and determine if more senior officials
14 need to be aware.

15 Q. So, with the 24/7 WikiLeaks Working Group, then, when they
16 try to stay ahead, reduce something to writing?

17 A. Reduce something to writing meaning?

18 Q. Well, I imagine if they're looking at cables--and we'll
19 just take the cables that had been released that they were looking
20 at, not the entire database----

21 A. Uh-huh.

1 Q. ----you said that they would look at those cables in order
2 to try to stay ahead of the release and then inform certain people
3 of, I guess, their observations, is that correct?

4 A. Yeah, more or less.

5 Q. And those observations, were they reduced to writing?

6 A. The group, like all working groups or task forces, produced
7 situation reports that were written and disseminated within the State
8 Department and, in some cases, outside, but within the government.

9 Q. And the situation reports were, essentially, the group's
10 analysis or review of whatever cables they looked at?

11 A. Yeah, it was--what the situation reports were they--it was
12 a snapshot of what the current situation was in order to give kind of
13 a common operating picture to folks in the department and elsewhere
14 who weren't on the working group or who were looking at these things.
15 So, it would have contained kind of the latest information--the
16 latest that the working group knew and, in some instances, context as
17 well.

18 Q. And I would imagine that, if it is situational and kind of
19 the latest snapshot view, that that would be updated over a period of
20 time?

21 A. The group produced--yeah, it produced, twice-daily--I think
22 they were twice-daily, they may have tapered off towards the end--
23 situation reports.

1 Q. And, for the lifetime of the group, if it started,
2 basically--Ambassador Kennedy said 28 November 2010--26---
3 A. Sure.
4 Q. ----I mean, that's basically the same thing, when did the
5 group stop its work?
6 A. We stopped--I think it was around the 17th of December.
7 Q. Of what year?
8 A. Of 2010.
9 Q. So, at that point, 17 December 2010, can you tell me why
10 the group stopped?
11 A. We, typically, take down--or we call it "taking down"--we
12 end a working group or task force when it seems that the issues--it's
13 not a crisis anymore, essentially, and the issues that are left over
14 are important, but can be handled by individual bureaus or offices.
15 So, there is no need for everybody to be sitting in the same room
16 working together anymore, but individual offices will, then, take on
17 the issues that remain.
18 Q. All right. So, between, apparently, 28 November 2010 and
19 17 December 2010, it was a 24/7 group where they were constantly
20 working 24/7?
21 A. At some point--and I don't remember exactly when--but at
22 some point we stopped being 24/7 and we went to, I think, 18 or 12-
23 hour days--shifts until the end of the working group.

1 Q. And at the time of 17 December 2010, the unredacted cables
2 had not been released by WikiLeaks, correct?

3 A. I don't know the answer to that; I don't remember.

4 Q. When WikiLeaks--do you know that the WikiLeaks released the
5 unredacted versions of the cables?

6 A. I know that, now, everything has been released, but during
7 that time frame, I don't--I'm aware of something that happened much
8 later.

9 Q. No, I'm asking, now, as you sit there on the stand, are you
10 aware that WikiLeaks released all of the unredacted versions of the
11 cables?

12 A. I know that all the purported State Department cables are
13 out there. I don't exactly know who released this information.

14 Q. Okay. So, on 17 December 2010, the group kind of stood
15 down, at that point, it had done its job, apparently?

16 A. At that point, it had coordinated the State Department
17 response to the crisis and had developed mechanisms for the State
18 Department to handle remaining issues.

19 Q. And if the group was trying to stay ahead of the releases,
20 it would seem to make sense that the group must have reviewed any
21 issues that might have been within the potential disclosure of the
22 cables, would that be correct?

23 A. I'm not sure I understand the question.

1 Q. Sure, I'll rephrase it.

2 A. Thank you.

3 Q. The--you indicated that, initially, the group was looking
4 at potential releases--to stay ahead of the releases, correct?

5 A. Uh-huh.

6 Q. And the goal, I guess, that was to educate those people who
7 might be speaking on any purported leak by the Department of State,
8 not only what might be released, but perhaps any risks or issues that
9 the Department of State might note from the releases, is that
10 correct?

11 A. Sure. So, what--that's--as I recall--and I--their--the
12 immediate--one of the things that precipitated the immediate response
13 that required a task force, apart from the secretary's travel and
14 just the fact that this was something that impacted the State
15 Department worldwide, was the fact that there were newspapers that
16 were publishing articles. There were a series of articles and so,
17 while there was a general acknowledgment that we had no idea of how
18 long releases of purported information was going to continue, one of
19 the things the group tried very hard to do was to figure out an on-
20 going mechanism for staying ahead of the information that didn't
21 require a group of people to work in a room 24/7. So, over the
22 course of the three weeks that the working group existed, that was a
23 big part of what it tried to do which was figure out--this is not

1 time-limited, how will the department manage to continue what the
2 group has done here on an on-going basis.

3 Q. So, when that group was looking at it to try to, basically,
4 get ahead of the releases and develop a strategy, I guess, for the
5 Department of State from a standpoint of on-going, did the working
6 group look at all of the potential releases from the Net-Centric
7 Diplomacy database?

8 A. I'm not sure exactly how to answer that except to say that
9 one of the tasks of the working group was not to review that; it
10 would have been too onerous for the group to do. So--but there was
11 kind of an acknowledgment of what was in that body of information.
12 Does that answer your question?

13 Q. I think so, I mean, just from a timing. If it was 3 weeks,
14 I would understand that would be a very difficult task to look at the
15 entire database. Was there somebody within the Department of State,
16 to your knowledge, that was looking at the cables to, basically,
17 educate, you know, the secretary or anyone else has to what might be
18 potential risks for disclosure?

19 A. Yes. I don't know the specifics, but there was--the
20 department asked every post to look at cables that were in that
21 database.

22 Q. So, that would have been the Chiefs of Mission Review?

23 A. I suppose--I think, probably.

1 Q. So, from your position as the Director of the Operations
2 Center, did you have any involvement with the 24/7 WikiLeaks Working
3 Group?

4 A. I did. It was--the group operated under the auspices of my
5 office. So, I didn't have a formal role on the task force, but I had
6 quite a bit of contact and I was there in working with them.

7 Q. And, again, understanding that this information may be
8 classified, so I'm not asking you to reveal anything that's
9 classified, but the situational reports that they submitted----

10 A. Uh-huh.

11 Q. ----twice-daily, in general, what was the format, I guess,
12 of those reports?

13 A. Generally, situation reports are formatted--it depends on
14 what's going on, but, generally, there would be a latest information
15 session--and I don't remember exactly what all these looked like.
16 There were, over a series of three weeks, there were probably two a
17 day, but they would have had a regional breakdown of the latest
18 developments and some of them, I think, may have had components
19 talking about possible diplomatic engagement.

20 Q. And what was the working group reviewing in order to create
21 the situation reports?

22 A. Generally, it was looking not just at what might have been
23 publicly disclosed in the websites of the various media outlets, but

1 also reporting from posts in talking to--the representatives would
2 talk with their subject matter experts in the regional bureaus and
3 functional bureaus. So, it was a way to coordinate all the
4 information of the State Department.

5 Q. All right. So, in addition to, I guess, the creation of
6 the situation reports, then--in order to create those reports, you
7 would get information from outside sources, is that correct?

8 A. Internal to the State Department, but it--the working
9 group's job was to kind of harness all of the resources of the State
10 Department. So, yeah, the working group would have spoken with posts
11 overseas as well as folks within the department that work on the
12 various issues that were impacted.

13 Q. Do you know, from your position, whether or not that
14 information from other posts or whatnot was reduced to writing?

15 A. It would have been in the--as a--it would have been the
16 situation reports; that's the--the situation reports would have been
17 the main way of reporting out what the working group was learning and
18 doing.

19 Q. How about supporting documentation, then? I think that's
20 what I'm asking. If I contacted, say, for example, the--a particular
21 embassy overseas, ask them for information, they gave it to me in a
22 written format, then I took that and reduced it into a situation

1 report, with the documentation coming from the outside sources be
2 reduced to writing?

3 A. It might've been--it might have--it's possible.

4 Q. And would that be included within the situation report like
5 an attachment or in enclosure?

6 A. Generally not. It's really a little bit hard to say.
7 Often, it might have been a phone call or face-to-face interaction
8 with people in the building. It could, potentially, have been an
9 email, but I don't know for sure. And, if it was an email, it would
10 not have been attached.

11 Q. And, after 17 December 2010, what was done with the work
12 product of the 24/7 WikiLeaks Working Group?

13 A. We--I'm not an expert on it, but what will generally happen
14 with the work product from a task force or working group is that our-
15 -a piece of our larger office will capture that information. Some of
16 it will be record information and some of it is maintained for a
17 certain period of time, but I really am talking a little bit out of
18 my lane, here.

19 Q. Okay. Does the Operations Center capture any of this
20 information?

21 A. The Operations Center is part of a larger organization, the
22 Executive Secretariat, and so we don't necessarily do that, but

1 there--we have a sister office that's part of our organization--our
2 larger organization that would have done that.

3 Q. And what organization is that?

4 A. The Executive Secretariat is the larger organization.

5 Q. And I understand it's a little bit out of your lane, so
6 it's fine if you say, "I don't know," but would you expect that the
7 Executive Secretary would actually have the documentation?

8 A. I think that whatever we would have been required to
9 preserve, we would have absolutely preserved.

10 Q. All right. Before I go to the potential risk individuals,
11 is there anything else about the 24/7 WikiLeaks Working Group that
12 you think is important that I haven't asked you?

13 A. That's hard for me to answer. I don't know, but I'm happy
14 to answer anything else that you---

15 Q. Okay. Well, let's talk about the potential risk to
16 individuals.

17 Q. Sure.

18 Q. Again, can you tell me--was that group given a specific
19 name?

20 A. It was called the WikiLeaks Persons at Risk Working Group.

21 Q. And how is that group created?

22 A. Well, one of the--what I mentioned earlier was we--one of
23 the things that we worked on throughout the course of the working

1 group--the WikiLeaks Working Group was a way to try to figure out how
2 to handle some of the issues that had come up on an on-going basis
3 and this was a piece of that. So, when we took down the WikiLeaks
4 Working Group, we stood up, so to speak, this other task force. I
5 use "task force" and "working group" interchangeably--it's the same
6 thing--to deal with this issue in particular because there were not--
7 it was difficult to find a mechanism that already existed to handle
8 some of the specific issues that came out of it.

9 Q. All right. And how many people comprise this group?

10 A. This was--it was, again--it was all of the regional bureaus
11 and then probably five other heroes as well. So, 12 to 15--and there
12 were--on this working group, excuse me, there were two
13 representatives from each bureau.

14 Q. And I take it if it was stood up after the WikiLeaks
15 Working Group was basically disbanded, then it would be sometime in
16 December 2010 or----

17 A. Uh-huh, and in the same moment that we took down the
18 WikiLeaks Working Group, in the same paperwork, we stood up this
19 other one.

20 Q. And can you tell me the primary mission of this other
21 group?

22 A. This group wanted to identify people who may have been
23 identified as at risk due to disclosures in the reported State

1 Department information and develop a way to handle--develop ways to
2 help them into--in policy to deal with the issue on an on-going
3 basis.

4 Q. And is this group still working?

5 A. The group is working informally; it's not working as a--
6 it's no longer working under the auspices of the Operations Center,
7 but as an informal working group to manage this issue. It does--I'm
8 aware of the fact that it does still, occasionally, meet.

9 Q. When did the group cease to operate under the auspices of
10 the Operations Center?

11 A. It was around May of 2011.

12 Q. So, from December 2011 to May of 2011, the group was under
13 the Operations Center?

14 A. 2000--December 2010 to May 2011, yes.

15 Q. I'm sorry, yes. And I imagine if the goal was to identify
16 potential persons at risk, then this group would have to review all
17 the cables?

18 A. The--again, the group did not review all the cables, but
19 the group asked--post--to review the Net-Centric Diplomacy database
20 as well.

21 Q. All right. So, correct me if I'm wrong, then, what you're
22 saying is the group asked the Chiefs of Missions to review the

1 cables, identify potential persons at risk, and then report them to
2 the group? Is that how it was done?

3 A. More or less. It was to try to identify people at risk and
4 that was handled and--it was very individual--it was handled in a
5 very individual way. Sometimes they would make that information
6 known to the working group, sometimes they would try to speak with
7 those people individually to see if they felt at risk. It was--the
8 only thing that the working group asked us to do was just to scrub.
9 They didn't ask them to, necessarily, to draw each and every one of
10 those people to the working group's attention.

11 Q. All right. So--and, again, you can tell me where I'm
12 missing it, I think the WikiLeaks Working Group for persons at risk
13 was designed to identify persons at risk from alleged disclosures.

14 A. Uh-huh.

15 Q. So, how did they identify persons at risk?

16 A. They--as they went through the database--the Net-Centric
17 Diplomacy database.

18 Q. So, did the group review all the cables in order to
19 identify persons at risk?

20 A. Right, they did.

21 Q. And so, that group, then went cable-by-cable, apparently
22 lining whoever they thought, potentially, would be persons at risk?

1 A. The group did not, but we--the group asked the embassies
2 overseas to review their reporting that might have been included in
3 that database and to make its own judgment about whether or not to
4 draw those people to the group's attention.

5 Q. So--all right. So, if I understand it right, then, the
6 Chiefs of Mission reviewed the cables, if they saw anyone in the
7 cables from their embassy that they thought was at risk, they would
8 identify those people to the Persons at Risk Working Group?

9 A. They may have and they may not have, but they would make
10 that judgment on--they would look at each case individually. They
11 may decide, "Gee, this person---" they may decide this person may be
12 at risk, may not be. They may decide, "We're going to ask this
13 person--we're going to let this person know that they've been--that
14 they're--we've used them as a source in this cable," and then the
15 Chiefs of Mission would determine whether or not--not whether or not
16 the person was at risk----

17 Q. Sure.

18 A. ----but whether or not to draw that to the attention of the
19 working group.

20 Q. All right. So, if I understand correctly, the working
21 group--whatever names they've got, they got from Chiefs of Mission?

22 A. That is my recollection, yes.

1 Q. All right. And so, then, once the working group got these
2 names, what, in general, was the working group--well, actually before
3 that, in order to get these names, was this something in writing that
4 came from the Chiefs of Mission saying, "Here are the people we want
5 to bring to your attention"?

6 A. Sometimes it would be in writing.

7 Q. And other times?

8 A. Sometimes, it would be in writing, sometimes there would be
9 a phone call or other kinds of communication.

10 Q. And once those names got to the Persons at Risk Working
11 Group, did that group put together any sort of report--like a weekly
12 report or whatnot, much like the 24/7 group?

13 A. The group did--it was an unusual working group. It didn't
14 report widely at all and it was--the purpose of the group was not to
15 disseminate this information, but it did, on a regular basis--and I
16 can't remember if it was weekly or if it was less regular than that--
17 report status to the secretary in an information memo.

18 Q. In this information memo, then, was written?

19 A. It was written.

20 Q. And, other than the information memo, was there any
21 supporting documentation-type--attached to it?

22 A. Not attached, but the group maintained a matrix on a
23 SharePoint site of the individuals that it was tracking.

1 Q. Besides tracking individuals and reporting to the secretary
2 in a memo, what was this group's task, in general, then?

3 A. What it was meant to do is to consider these cases on an
4 individual basis and determine whether or not the department could be
5 helpful to them and also to formulate some kind of guidance for posts
6 overseas in case they were approached. The understanding was that
7 this was going to be an on-going issue to be dealt with. So, it was
8 important for the group to formulate some kind of guidance to give
9 embassies overseas context and help decision-making if they were
10 approached by people who presented as somebody who was impacted by
11 this.

12 Q. So, in May of 2011, can you tell me why it was taken out of
13 the auspices of the Operations Center?

14 A. As I recall, I think the idea was that, at that point, it
15 was working--it sort of was working on its own. One of the reasons
16 that--it didn't--they no longer need to be housed kind of an office
17 of the secretary which is where we live, but the--it was--the group
18 was working together very well and working together regularly and
19 have processes in place, so didn't really need our office to help it
20 along.

21 Q. And does this group that, apparently, is still--you said
22 you believe it is still meeting informally?

1 A. Uh-huh, I believe it--I say "informally" because I'm not
2 super-aware of when it meets. I assume it meets quite formally, but
3 I think it does meet and I know that they still communicate by email.
4 There is still people in each of these offices of the department that
5 have former responsibility to be part of this group.

6 Q. And so is the group still comprised of, basically, 15
7 members?

8 A. I think so; I don't know for sure.

9 Q. And do you know if the group is still submitting memos to
10 report----

11 A. I don't believe it is. That was something that--I don't
12 know how long that went on. It didn't--the memos became less
13 frequent after a month or two months of the working group and I don't
14 exactly when that stopped.

15 Q. And with regards to the memos, do you know where those
16 might be stored or captured?

17 A. Those are, again, official record memos that--they went to
18 the secretary so they would have been captured in the formal process
19 that the department uses to capture information that goes to the
20 secretary.

21 Q. So, if one were looking for those memos, would you go to
22 the executive Secretary, then, or would you go somewhere else?

1 A. I don't know how to answer that. I guess--they would not
2 be available to--because they're pretty sensitive, they may be
3 restricted in some way, but it would be the normal way that you would
4 go to get something that is part of the record of the State
5 Department.

6 Q. And you indicated that you didn't believe the group was
7 submitting memos at this time and why is that?

8 A. I don't know.

9 Q. You don't know why you believed that?

10 A. I don't know why they would not be and I don't actually
11 even know--I have not seen any, recently, that they've done, but,
12 again, because they're not part of my office, I might not.

13 Q. Okay. Did--when you said that they were trying to work
14 together, I guess, a formal guidance or whatnot, did they put
15 anything out to the embassies?

16 A. I recall that they did.

17 Q. How was--in general, what was that?

18 A. I recall that they did at least one cable--a message to all
19 embassies and diplomatic posts.

20 Q. And that one cable was that guidance as to what they needed
21 to do or was that the cable asking the Chiefs of Missions to submit
22 names?

1 A. They did one--at least one guidance cable and there may be
2 more, but I just don't recall.

3 Q. Okay. And "guidance cables," what does that mean?

4 A. It would have been a message to all consular and diplomatic
5 posts breaking down some--essentially, guidance and the ways that the
6 department may or may not be able to help people that they became
7 aware of.

8 Q. All right. So some sort of like remedial measures if
9 someone has been identified and you think they're at risk, these are
10 the remedial measures we can take?

11 A. Yeah, it--you--"Here are the things you should do, here are
12 the things that you should think about."

13 Q. All right. And was that put out as a distro cable to all
14 the embassies, or was that put out in some other form or fashion?

15 A. Would have been a message to all embassies overseas.

16 Q. So, obviously, that document you would expect to still be
17 in existence?

18 A. Uh-huh.

19 Q. And if one were trying to obtain that document, where would
20 you go?

21 A. This would be--this information would be, again, captured--
22 classified, but captured--the information within the document would

1 classified, but it would be captured in the same way as all other
2 official record documents are.

3 Q. And that is how?

4 A. Again, it's hard for me to know exactly how to answer that,
5 but however one gets record documents from the State Department.

6 Q. I'm going to ask you about some of the other things that
7 the Department of State has done, apparently, in reaction to the
8 release of the cables. If you don't have any knowledge about that,
9 you can just tell me you don't have any knowledge, okay?

10 A. Uh-huh.

11 Q. Are you familiar with the Chiefs of Mission review?

12 A. I'm familiar with the fact that it happened.

13 Q. And what is the basis--I guess what's the extent of your
14 familiarity with that?

15 A. I know that prior to the initial release of purported
16 information posts, Chiefs of Mission were asked to review that
17 particular database.

18 Q. And, from your knowledge, are you aware of whether or not
19 it was Chiefs of Mission just reviewing information from their
20 particular embassy and then reporting back or reviewing the whole
21 database?

22 A. I don't know. Cannot--Have you ever seen anything from the
23 Chiefs of Mission review?

1 A. I've never reviewed anything; I may have, but I don't,
2 specifically, remember.

3 Q. So, the Chiefs of Mission review wasn't anything that went
4 through the Operations Center?

5 A. Uh-uh.

6 Q. With regards to the WikiLeaks Mitigation Team, did you have
7 any involvement with that team?

8 A. I'm aware of their work but, no.

9 Q. You haven't seen anything from their work?

10 A. I've been copied on some e-mails, but I--it is pretty far
11 out of my lane so I haven't really engaged very much--I don't know
12 very much about it.

13 Q. And then the Department of State briefings to Congress, are
14 you familiar with their briefings to Congress?

15 A. Not specifically.

16 Q. So, the Operations Center didn't do anything in order to
17 put together a message for Ambassador Kennedy or anyone else from the
18 Department of State and they were reporting to either the Senate or
19 the House?

20 A. I can say that--no, I don't think that we did. I am not
21 aware of anything we did to feed into that.

1 CDC[MR.COOMBS]: And Ms. Bitter, again, I want to thank you for
2 answering my questions on such short notice. Major Fein may have
3 some questions for you or the Court may.

4 WIT: Thank you.

5 TC[MAJ FEIN]: Your Honor, the government has no questions for
6 this witness.

7 MJ: All right.

8 **[The witness was excused and withdrew from the Courtroom.]**

9 CDC[MR.COOMBS]: Your Honor, I think that's all for the
10 Department of State witnesses we have in person. If we could,
11 perhaps, have a 10-minute comfort break and then we could pick up
12 with the 793 motion?

13 MJ: All right. Court is in recess for 10 minutes. We'll start
14 again at a quarter to 11.

15 **[The Article 39(a) session recessed at 1034, 7 June 2012.]**

16 **[The Article 39(a) session was called to order at 1050, 7 June 2012.]**

17 MJ: This Article 39(a) session is called to order. Let the
18 record reflect that all parties present when the Court last recessed
19 are again present in court.

20 All right, before we proceed, the Court is prepared to rule
21 on the defense motion to compel identification of *Brady* materials.
22 That motion was presented with oral argument yesterday. Defense
23 moves the Court to exercise its inherent discretion and order the

1 government to identify or separate *Brady* material when providing
2 discovery to the defense. The government opposes. After considering
3 the pleadings, evidence presented, and arguments of counsel, the
4 Court finds and concludes the following:

5 One, the defense asserts the government has provided the
6 defense with 12 pages of *Brady* material taken from an
7 assessment/investigation/working document review of the Office of the
8 National Counterintelligence Executive, Office of the Director of
9 National Intelligence (ODNI), and the Information Review Task Force
10 (IRTF) of the Defense Intelligence Agency (DIA). Additionally, the
11 government has provided the defense with approximately 9000 pages
12 from the Federal Bureau of Investigation (FBI), which contain *Brady*
13 material and additional discovery. The pages are redacted. The
14 defense asserts the FBI files are not text searchable.

15 Two, there are for available facilities where the defense
16 can store and access the FBI files: one, Trial Defense Service
17 Office, Fort Myer, Virginia, available since 12 October 2010; two,
18 Trial Defense Office, Fort Leavenworth, TDS, available since 22 June
19 2011; three, Trial Defense Office, Fort Meade, Maryland, available
20 since 10 June 2011; and, four, Naval War College, Rhode Island,
21 approximately 30 miles from Mr. Coombs office. At the request of
22 civilian defense counsel, Mr. Coombs, the government provided
23 facilities in Rhode Island to make it easier for him to access and

1 store classified information without having to travel to the National
2 Capital Region.

3 Three, there currently three defense counsel representing
4 the accused: Mr. Coombs, civilian defense counsel, Major Hurley,
5 Individual Military Counsel, and Captain Toomey [sic], Detailed
6 Defense Counsel. The accused released original detailed defense
7 counsel, Major Kemkes and Captain Bouchard, during the Article 39(a)
8 session on 15 and 16 March 2012. Captain Toomey [sic] was detailed
9 to the case during the Article 39(a) session 24 through 26 April 2012
10 and Major Hurley was added to the defense team as Individual Military
11 Counsel on 4 June 2012--or---excuse me, 6 June 2012--during the
12 current Article 39(a) session. Defense has not requested additional
13 staffing for the defense team.

14 Four, the accused is in pretrial confinement at Fort
15 Leavenworth, Kansas. There is a safe to store classified information
16 at Fort Leavenworth Trial Defense Office.

17 Five, the parties dispute whether the government is
18 required to release the non-Brady portions of the FBI file under
19 R.C.M. 702(a)(2) as material to the preparation of the defense. The
20 bulk of the FBI discovery given by the government the defense, thus
21 far, is Brady material. There is no evidence the government has
22 "padded the file" or otherwise exercised bad faith and burying the
23 Brady needle in the haystack of the FBI files disclosed.

1 Six, neither R.C.M. 701(a) (6) nor *Brady* require the
2 government to identify or separate what material it discloses in
3 discovery is *Brady* material. See *United States v. Warshak*, 631 F.3d
4 266 (6th Circuit, 2010) (declining to order the government to organize
5 and index discovery would not be required by Federal Rule of Criminal
6 Procedure 16). The Court has not been presented with any military
7 cases addressing this issue, however, the Court agrees with the Fifth
8 Circuit that there is no general duty that requires the government to
9 direct the defense to exculpatory evidence within a larger mass of
10 disclosed evidence. *United States v. Skilling*, 554 F.3d 529, 576
11 (5th Circuit, 2009).

12 Seven, the defense relies, primarily, on *United States v.*
13 *Salyar*, 2010 Westlaw 3036444 (Eastern District of California) and
14 *United States v. Hsia*, 24 F.Supp.2d 14 (District Court of the
15 District of Columbia, 1998). Both of those cases involved "open
16 file" cases with far more voluminous discovery than at issue in this
17 case and, in each, there was evidence that the prosecution dumped the
18 haystack of discovery requiring the defense to find that *Brady*
19 needle. In *Salyar*, the Court accepted the general rule set forth in
20 *Skilling* and *Warshak*, but as a matter of case management, ordered the
21 government to identify *Brady* material from what the Court described
22 as a massive amount of documentary evidence collected over 5 years
23 consisting of multiple gigabytes, pages numbering in the millions,

1 and hardcopy information filling more than 2 "pods" or storage
2 containers.

3 Eight, discovery is voluminous in this case, but not nearly
4 to the extent as in *Salyar* or *Hsia*. Today, the government has
5 provided defense with more than 43,886 documents consisting of
6 approximately 411,366 pages. The approximately 9,000 pages the
7 defense alleges has been disclosed from the redacted FBI files are a
8 small part of the total discovery today. There is no evidence that
9 the government is padding discovery to hide *Brady* material.

10 Nine, the court finds no good cause to deviate from the
11 general rule that the government is not required to sift through each
12 item of discovery and separate or identify *Brady* information
13 contained within a larger mass of disclose evidence.

14 Ruling: the Defense Motion to Compel Identification of
15 *Brady* material is denied.

16 That will be marked as the next appellate exhibit in line.
17 For the record, that would be Appellate Exhibit 131.

18 The next issue is the Defense Motion to Dismiss
19 Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II which are
20 the charges under 18 United States Code, Section 793(e) and Article
21 134, Uniform Code of Military Justice. The defense motion is
22 Appellate Exhibit 88. The prosecution response is Appellate Exhibit
23 89.

1 Is the defense ready to proceed with oral argument?

2 ADC[CPT TOOMAN]: Yes, Your Honor. Your Honor, when a statute
3 is challenged as being void for vagueness, the Courts are clear that
4 the standard is: is the statute written so that a person of common
5 intelligence, with a common understanding of the law would know the
6 conduct is prohibited? Here, the phrase "relating to the national
7 defense" is vague. The motion the defense submitted discusses the
8 historical development of that phrase in the way the Courts have
9 treated that phase. But that development makes clear is that, from
10 the 40s when the phrase was first looked at, up until today, the
11 Courts have acknowledged that that phrase is vague. Though they
12 haven't ruled that it was unconstitutional for vagueness, the Courts
13 have acknowledged that it's vague. They've made that acknowledgment
14 by using limiting instructions including judicial gloss on that
15 phrase.

16 MJ: So why can't this court do that?

17 ADC[CPT TOOMAN]: Your Honor, the defense's position is that,
18 for the past 70 years, courts have been putting judicial gloss on
19 this phrase. Certainly, this court could do that, but it's the
20 defense's position that, at some point, when you put gloss on top of
21 gloss on top of gloss, the judiciary has now put itself in a position
22 where they're legislating rather than letting the statute speak for
23 itself. And so, that is the defense position. Just based on the

1 amount of gloss that has been put on this phrase, "related to the
2 national defense," it's clearly vague.

3 Along those lines, Your Honor, the phrase, "injury to the
4 United States or advantage to any foreign nation," is also vague.
5 Again, that's a phrase that's had a lot of judicial gloss put on it.
6 It's all phrased in the disjunctive and so it's possible that an
7 individual could be charged under this statute where there is no
8 injury to the United States at all and still be found guilty.
9 Additionally, as that gloss has been put on that phrase, the Courts
10 have started to make the "injury to the United States or the
11 advantage of any foreign nation" a modifier of the *mens rea*, which,
12 under the statute is "willfully." But, really, that phrase is a
13 modifier of the type of information, it's not a modifier of the *mens*
14 *rea*. And so, you've seen from the Courts they've started to take
15 that phrase and make it a *mens rea* issue when, really, it's type of
16 information issue.

17 And, finally, Your Honor, the--in particular, the word
18 "injury" is vague. It's unclear, first of all, what type of injury
19 is required. Is it required--is it physical injury, is it
20 embarrassment, is it monetary injury? That is unclear and what is
21 also unclear is the extent of the injury that's required. Is it
22 minimal injury? Just the scantest little thing? Or does it have to
23 be some sort of grave injury? And so, because that's unclear and no

1 courts have cleared that up, it's the defense's position that that is
2 unconstitutionally vague.

3 Additionally, Your Honor, the defense's position is that
4 this is an overbroad--unconstitutionally overbroad as well. Of
5 particular note is the--some of the language used by the *Morison*
6 court where they talk about national security being related to the
7 security of the public. National security is not a phrase that's
8 meant to protect the government to protect the government from things
9 that are embarrassing, it's--national security, as contemplated by
10 the statute, is the security of the people to have information and be
11 able to understand what their government is doing. Certainly, the
12 statute could reach a lot of protected speech and, as such, we feel
13 that this is overbroad. Subject to your questions, ma'am.

14 MJ: Thank you. Government?

15 ATC [CPT MORROW]: Your Honor, the government opposes the
16 defense motion to dismiss. 18 U.S.C. 793 is neither
17 unconstitutionally vague in violation of the Fifth Amendment or
18 substantially overbroad in violation of the First Amendment. With
19 respect to the vagueness argument, Your Honor, the government
20 maintains that that statute, 793(e), provides fair warning to persons
21 of ordinary intelligence. In fact, the phrase "relating to the
22 national defense" has been repeatedly challenged by courts--or by
23 defendants on the basis it--impermissible vagueness and it has

1 survived scrutiny. As you know, the Supreme Court, in *Gorin v.*
2 *United States*, held that the language employed by the predecessor
3 statute to 793(e), specifically the term or phrase, "relating to the
4 national defense or connected with the national defense," was
5 sufficiently definite to advise the ordinary man of its scope. And,
6 as the defense notes, certainly courts have provided further judicial
7 gloss to the phrase "relating to the national defense," the defense
8 has failed to establish by further refinement and didn't remedy the
9 vagueness concerns that--of language that the Supreme Court has
10 already found to be sufficiently definite. And, in fact, that
11 judicial gloss has arguably added more protection for defense than
12 required by *Gorin*. Accordingly, this court should find that phrase,
13 "related to national defense," sufficiently definite and the
14 accused's arguments to the contrary foreclosed by *Gorin v. United*
15 *States*.

16 The defense also challenges the phrase, "to the injury of
17 the United States or to the advantage of any foreign nation." That
18 phrase also provides a fair warning provided by the due process
19 clause. And, in fact, as outlined in the government's brief, that
20 phrase has an additional scienter requirement where the defendant is
21 charged with transmitting information relating to the national
22 defense, instead of intangible items listed in section 793(e). In
23 that sense, it is more accurately characterized as a limiting factor

1 rather than a phrase that invites some uncertainty as to its scope.

2 But, setting aside even that----

3 MJ: So, in the specifications at issue here, the government is
4 charging information, rather than tangible objects?

5 ATC [CPT MORROW]: We did, Your Honor, just because of the
6 nature of computer files. We thought it was prudent to add in that
7 additional scienter requirement.

8 MJ: All right.

9 ATC [CPT MORROW]: But, setting aside that question of whether
10 the phrase is the additional scienter requirement, any vagueness
11 concerns with the statute are mitigated by the other scienter
12 requirement section 793, namely, "willfully." It requires the United
13 States to prove the accused acted willfully and as the Supreme Court
14 has repeatedly recognized and as this court has recognized in its
15 Article 104 ruling, a scienter refinement mitigates the law's
16 vagueness with respect to the notice requirement. And, additionally,
17 even with respect to, specifically, the willfulness requirement in
18 793, the Fourth Circuit and *Morison* look at that and use that as a
19 basis for denying the defendants challenge to the vagueness and
20 statute.

21 With respect to over breadth, Your Honor, that, like the
22 defense assertion of impermissible vagueness, section 793 has endured
23 similar challenges on the basis of over breadth and that's briefed by

1 the government, the *Rosen* court, and the *Rosen* and the *Morison* court,
2 Fourth Circuit; both took similar approaches to that over breadth
3 question. *Rosen* concluded, after construing various terms and
4 provisions that the statute was "narrowly and sensibly tailored to
5 serve the government's legitimate interest in protecting national
6 security."

7 MJ: And what did those courts say about the--whether it is a
8 First Amendment concern at all, or is there?

9 ATC [CPT MORROW]: The *Rosen* court?

10 MJ: Yes.

11 ATC [CPT MORROW]: As I recall, the *Rosen* court was dealing with
12 defendants that were part of the lobbying for--and so there were some
13 First Amendment issues in that case because they obviously didn't
14 have a relationship with the government like the accused has in this
15 case with signing with signing a nondisclosure agreement with the
16 Army, etcetera. So, there were some First Amendment rights
17 implicated in that case and the fact that the government would
18 maintain that there are no First Amendment rights implicated in this
19 case and, actually, we put this in our brief, but I'm not arguing
20 today--we think the defense should be precluded from even challenging
21 the statute as vague on its face without some First Amendment right
22 now.

1 But, getting back to the *Morison*--or the *Rosen* court's
2 analysis in the *Morison* court, they construed the various terms and
3 provisions in the statute and they found no substantial overbreadth
4 based on that. And despite persuasive case law on the overbreadth
5 question, the defense argues that section 793 puts--poses substantial
6 dangers to the free speech rights of reporters. Of course, the
7 defense is permitted to raise the constitutional rights of third
8 parties, the overbreadth challenge, but what they failed to do is
9 really establish why the application of statute--the hypothetical
10 case, somehow renders the entire statute substantially overbroad.
11 Again, it has got to be a substantial number of applications in
12 relation to the plainly legitimate application of the statute.

13 And finally, Your Honor, with respect to the Rule of Lenity
14 which was sort of mentioned in a small paragraph in the defense
15 brief, they argued that the Rule of Lenity requires any ambiguity in
16 the statute to be resolved in the accused's favor. The government
17 agrees with that characterization to the extent that there is some
18 narrow construction and a broader construction--and there's also some
19 fatal or grievous ambiguity in the statute. The government does not
20 agree that the Rule of Lenity compels this court or any court to take
21 the drastic step of declaring the statute unconstitutional. Subject
22 to your questions, Your Honor.

1 MJ: All right. Thank you. The Court has been informed by the
2 parties briefs as well as oral argument and will be prepared to rule
3 on this issue before the close of these Article 39(a) session days.

4 Are the parties prepared--yes?

5 CDC [MR.COOMBS]: Ma'am, I was just going to say the defense is
6 prepared to go with the lesser included offenses argument.

7 MJ: All right. Why don't we go ahead and move on to that
8 motion?

9 CDC [MR.COOMBS]: That would be Appellate Exhibits 103, 105, and
10 123 for the defense. 103 is our lesser included defense request.
11 123 is our reply to the government's response and 105 is our response
12 to the government.

13 MJ: All right. Why don't we start with the lesser included
14 defenses that the defense requests?

15 CDC[MR.COOMBS]: Yes, ma'am. Our main concern with lesser
16 included offenses is that the accused is placed on notice of what he
17 will have to possibly defend against based upon the charge sheet. In
18 this case, PFC Manning was placed on notice that a violation of AR
19 380-5, captured within Article 92, would, in fact, be a lesser
20 included offense under the charges--under Charge II that allege a 793
21 offense in 18 U.S.C. 793; that would be Specifications 2, 3, 5, 7, 9,
22 10, 11, and 15.

1 Now, in order to determine whether or not we do have a
2 lesser included offense, CAAF has directed courts to implement the
3 elements test. And when you take a look at the cases--the *Jones*
4 case, the *Alston* case, *Arriaga* case, the *Bonner* case, they all lay
5 out guiding principles for a court when it comes to deciding whether
6 or not an offense is a lesser included offense. Those are that
7 offenses do not have to use identical statutory language. Second,
8 that the fact that there may be alternative means of satisfying the
9 lesser included offense does not mean that it is not a lesser
10 included offense. Third, that elements with--that are not only
11 statutory elements, but--especially when the government is bringing
12 in a 134 offense--as alleged elements are elements that the Court has
13 to look at with regards to doing the elements test.

14 MJ: But what are you relying on that for? The test is outlined
15 by the Court of Appeals for the Armed Forces, isn't it a statutory
16 elements test base?

17 CDC[MR.COOMBS]: No, Your Honor, it is not. *Jones*--and,
18 actually, if you--I believe it is in either *Arriaga* or it's in
19 *Alston*, the Court states, especially with 134 offenses--134 offenses
20 are made specific based upon how they're alleged because, as you look
21 at it, a 134 offense is just you've done some conduct and that's
22 prejudicial to good order and discipline. So, in order--you can't--
23 a--statutory elements are that; you obviously cannot rely upon the

1 statutory elements. You have to inform the statutory elements by how
2 the government has alleged the element in the charge sheet.

3 So, CAAF has made clear that you look not only to the
4 statutory elements, but how the government has pled it. Going back
5 to what we commonly refer to as--for a trial counsel, at least--you
6 own what you plead. So, if the trial counsel chooses to plead
7 certain elements in a specification, that becomes the elements test
8 for this court in determining what would be a lesser included
9 offense. And it has to be that way, actually, by way of the *Alston*
10 case. The *Alston* case used a statutory analysis where what they did
11 is they looked to see if aggravated sexual assault was a lesser
12 included offense of rape. And what was clear from the Court's
13 analysis was there were three different ways that the government
14 could prove the rape and, in this case, as pled, only one of those
15 three was at play. And, because of that, when the *Alston* court
16 looked at it and said, "As charged, aggravated sexual assault is, in
17 fact, a lesser included offense, because the force element that was
18 charged within the rape offense met with the force element that was
19 required by the aggravated sexual assault." The government's whole
20 argument as to there may be some other way of proving a lesser
21 included offense and, therefore, it cannot be a lesser included or
22 some other way of proving the greater and, therefore, this can't be a
23 lesser included falls flat on its face when you look at *Alston*. If

1 the government's theory was correct, then CAAF would not have decided
2 *Alston* the way it did.

3 MJ: Looking at the part of *Alston* that says "applying the
4 common and ordinary understanding of the words and the statute, each
5 act of force described in Article 120(t)(5)(c), at a minimum,
6 includes an offensive touching that satisfies the bodily harm element
7 of Article 120(t)(8)." So, I'm getting confused on how we're going
8 beyond the statutory element analysis.

9 CDC[MR.COOMBS]: Well--okay. Again, in this case, they're
10 looking at the one aspect of how the force within rape satisfies the
11 aggravated sexual assault. The Court looks just below--they--CAAF
12 recognizes that there are two other ways of rape that it could be
13 proven. And so, in this instance, it's how the charge was alleged
14 that makes the difference between how the Court is looking at it.
15 And, again, within the *Alston* case and I believe within the *Arriaga*
16 case, CAAF talks about 134 being a statute that the elements, again,
17 as we all know--if it was strictly a statutory elements test, then
18 this court would only go with what the elements are. And what are
19 those elements? Some conduct and that conduct is prejudicial to good
20 order and discipline or service discrediting.

21 MJ: Well, here, we have the additional Title 18 offense
22 somewhere in clause three; that's part of that offense.

1 CDC[MR.COOMBS]: You do, but if the government is--again, when
2 you're charging a 134 offense, if you were stuck, just strictly with
3 the statutory elements, then two things would be problematic with the
4 134 offense. You would not look to the specification to see what
5 that alleged conduct is because, clearly, by alleging certain
6 conduct, you may invoke a lesser included offense. It depends on
7 what you allege for the conduct. And, even in this instance, when
8 the government has brought in the 18 U.S.C. 793 offenses, they're
9 bringing in the offense and they are grafting onto that the clause
10 one and two language; that's not the statutory elements for the 134
11 offense as brought in by clause three, that's an election on the part
12 of the government.

13 So, again if you were stuck with just the statutory
14 elements, then you would never consider, when you're doing an
15 elements test, the clause one and two language of any clause three
16 offense. So, it simply can't be the case that you're limited solely
17 to the statutory elements. It is, in fact, how the government has
18 pled the offense that's important and that becomes a controlling
19 principle when the Court is taking a look at whether or not, in this
20 instance, the 380-5 offense is, in fact, an LIO of the charged 793
21 offenses. In looking at that, our brief and our reply brief goes
22 through the analysis that the defense recommends the Court take.
23 And, just briefly, without repeating the entire argument, you look at

1 a 793 offense and, generally, what you have there is an unauthorized
2 possession of some information related to national defense that the
3 Soldier either had a reason to believe could cause damage or knew
4 could cause damage or injury to the United States or some foreign
5 nature, and that Soldier gives it to an unauthorized party. And
6 then, as pled, you add to that the service discrediting conduct
7 prejudicial to good order and discipline language. An Article 92
8 offense, under 380-5, involves a Soldier with unauthorized possession
9 of classified or sensitive information and then, again, an
10 unauthorized disclosure of that information, either through knowing,
11 willful, or negligent conduct. When you look at how these offenses
12 are charged and you use the elements test, you cannot have an 18
13 U.S.C. 793 offense without having a violation of Article 92; it's
14 just not possible. The government has indicated----

15 MJ: That's where I'm confused: how can you not have a 793(e)
16 violation without having "there was, in existence, a lawful general
17 order"?

18 CDC[MR.COOMBS]: Because--and this is where--it's very important
19 when you take a look at--before the Jones case, Chief Judge Cox
20 talked about the fact that Article 92 is implicitly, by necessity,
21 part of and part and parcel of a 793 offense and the defense cited
22 the Court to the concurring opinion by Judge Cox. And that was based
23 upon the necessarily included test, basically.

1 Now, the Court has gone to an elements test, but the
2 important part of the elements test is you have to take a look at the
3 definitions to inform what the elements mean and that's where you go
4 back to--it's not a--the fact that the elements use different
5 statutory language does not mean it's not a lesser included offense.
6 So, when you look at our analysis, the elements one and two, the
7 existence of the lawful general regulation and the accused's duty to
8 obey it, is part and parcel to the first element of the 793 offense,
9 the unauthorized possession of information. Think for a moment: how
10 can a Soldier have an unauthorized possession of information related
11 to national defense and, again, as pled--with the exception of
12 Specification 2 and 11, everything is pled as classified--how can a
13 Soldier have an unauthorized possession of classified information and
14 not run afoul of AR 380-5? When you look at 380-5----

15 MJ: Is there any kind of evidence-based analysis versus a
16 statutory elements-based analysis? If you're looking at that theory,
17 in a BAH fraud case, wouldn't a false claim be a lesser included
18 offense of a larceny?

19 CDC[MR.COOMBS]: Well, again, ma'am, as you're going through the
20 analysis, especially with--under *Jones, Alston, Arriaga, and Bonner*,
21 they tell you to take a look at the definitions of the elements in
22 order to determine what the elements mean. So, if you look at the
23 definition--and let's look at 380-5, then, paragraph 1-1 which the

1 defense cited. This regulation establishes policy for the
2 transmission, transportation, and safeguarding of information
3 requiring protection in the interest of national security. It
4 primarily pertains to classified national security information, now
5 known as classified information, but also addresses--control
6 unclassified information, to include For Official Use Only and
7 sensitive, but unclassified. So, it's clear that regulation, the
8 duty to obey it, the--which is, ultimately, the unauthorized
9 possession, here, but also could be the fifth element or sixth
10 element, depending upon if you look at the government's version of
11 what the elements are, but the conduct prejudicial to good order and
12 discipline or the service discrediting, that conduct can be captured
13 by the duty to obey this regulation. 380-5 also indicates that--
14 covers the handling of classified and sensitive information. The
15 regulation prohibits, among other things, collecting, obtaining,
16 recording, removing, or any personal use whatsoever of any material
17 or information classified in the interest of national security.

18 So, when you look at the definitions--and that's what the
19 *Bonner* court and the *Alston* court asked the Court to do--what do the
20 elements mean? When you look at the elements and you define them,
21 you see that both the 793 offense and the 380-5 require an
22 unauthorized possession of information. And, when you look at 380-5,
23 any unauthorized possession of information under 793 would have to be

1 an unauthorized possession under 380-5. You simply cannot have one
2 without the other. There's no way to have committed a 793 offense
3 without committing a 380-5 offense; it's simply impossible and that's
4 because the regulation governs this conduct. So, in this instance---

5 -

6 MJ: Distinguish my hypothetical, then. You have a BAH fraud
7 case of larceny and it's charged that you, by submitting false
8 receipts, stole a certain amount of money from the government, these
9 false claims, are, in a lesser included offense of larceny?

10 CDC[MR.COOMBS]: Ma'am, I'd have to give some thought on that.
11 I don't think that that is a comparative analogy to this because, in
12 this instance, when you look at--what's the main difference between a
13 793 offense and a 380-5? The main difference, here, is that the
14 information could be used to the injury of the United States or to
15 the advantage of any foreign nation. That's the main difference
16 between a 793 and 380-5 offense. The government's assertion that you
17 can prove a 380-5 offense without also--or, in this case, prove a 793
18 without also proving a 380-5 is just a red herring because there is
19 no way that you can do that. And so, that--when you're looking at
20 what would be a lesser included offense, as the factor that you have
21 to assess, like taking a look at the duty to obey this regulation and
22 the violation of that duty compared to the unauthorized possession.
23 So, if this court--or--excuse me, if a panel determined that this was

1 an unauthorized possession of classified information that was
2 disclosed with third-party but did not involve information that could
3 cause damage to the United States or any of any foreign nation, then
4 380-5 would be the lesser included offense they would go down to
5 because that would be the conduct that is prescribed by regulation.

6 And when you look at element three of the Article 92
7 offense, the knowing, willful, or negligent disclosure and you
8 compare that against the 793 offense of the willfully communicating,
9 delivering, or transmitting, both of them involve a conduct of
10 providing information to an unauthorized person. So, it's clear in
11 this instance that all three elements of the Article 92 offense are
12 necessarily included within the 793 offense. Both necessarily
13 included under a pre-Jones analysis and necessarily included even
14 under a Jones analysis when you take a look at the elements and you
15 define what those elements mean, then it's clear in this instance
16 that a Soldier could not commit an 18 U.S.C. 793 offense without
17 first committing a 380-5 offense. And, therefore, when you cannot
18 commit one offense without the other, all the cases--all the recent
19 cases say that is a lesser included offense if it cannot be committed
20 without doing a lesser.

21 With respect to Specification 2 and 11, the government, in
22 its motion, talks about the fact that they are not required, in that
23 instance, to prove either classified or sensitive information; that's

1 their main objection, I guess, in addition to the others that the
2 380-5 is not a lesser included offense. But, again, as the Court
3 looks at what the definitions are for the elements, you'll see that,
4 even in this instance, when it's not a classified or sensitive
5 information being alleged, it still falls under a lesser included
6 offense and that is because of the requirement that the government
7 prove that this information is related to the national defense. And,
8 if you look at what the government is alleging in their response
9 motion, they indicate that the government has to prove that this
10 information is related to the national defense and a cite national
11 defense information for 18 U.S.C. 793 offense is "information that is
12 closely held by the government, and, two, potentially damaging to the
13 United States or useful to the enemy the United States if disclose
14 without authorization." Therefore, by the governments own admission,
15 if they are proving and--necessarily in proving that this information
16 is, potentially, damaging to the United States or useful to an enemy
17 of the United States, they are proving that it's sensitive
18 information. And, in order to get to that, you take a look at how
19 380-5 defines sensitive information. It defines sensitive
20 information as "any information, the loss, misuse, or unauthorized
21 access to or modification of, which could adversely affect the
22 national interests or the conduct of federal programs." Thus, if the
23 government proves that this information is related to the national

1 defense, it will, of necessity, also prove and establish that this
2 information is sensitive information as defined by 380-5.

3 So, even in the situations where the government has not
4 pled that it's classified information--and that would be
5 Specifications 2 and 11--again, because they own what they plead.
6 With regards to 2 and 11, they still have to prove it's related to
7 national defense and, when you look at what that means, by
8 definition, both what the government acknowledges its burden is under
9 793 and what 380-5 indicates what is sensitive information, then the
10 government, by necessity, would have to prove an unauthorized
11 possession of information under 380-5.

12 The fact that there may be, in this instance, even if the
13 government is correct, some other way of showing a violation of 380-5
14 without showing a violation of 793 is not important; *Arriaga* talks
15 about that. That does not indicate that this is not a lesser
16 included offense. As charged, now--and this is why it is important
17 to see how the government charges it--when they grafted on the clause
18 one and two language to these offenses, they have, by necessity,
19 required a showing of proof that this information could--that this
20 information was prejudicial to good order and discipline or service
21 discrediting. And, as the Court knows, especially from analysis of
22 134 and consideration by the Supreme Court in *Parker v. Levy*, of the
23 fact that we were concerned about the vagueness at 134. The

1 discussion within the clause one and two is that many of the offenses
2 that normally would've been found under clause one and two for 134
3 have been reduced to regulation and 380-5 is an example of that. The
4 duty to obey the regulation and the violation of the regulation is
5 the conduct that's prejudice to good order and discipline were
6 service discrediting. So, again, this court can look to see clause
7 one and two language as being the language that would bring in the
8 first and second element of the 380-5 offenses because, again, that's
9 exactly the conduct that would--in play or cause the government to be
10 able to prove that somebody has done something that's service
11 discrediting or prejudice to good order and discipline. The service
12 discrediting is failing to obey a general regulation--a lawful
13 general regulation. The prejudice to good order and discipline is
14 the unauthorized disclosure. That's the clause one and two language
15 bringing in the first two elements of the 793 offense.

16 Now, turning to Specification 1 of the Article 134 Offense,
17 this is the general 134 offense that the government has alleged.
18 Even in this instance, 380-5--in violation of 380-5 would be a lesser
19 included offense. You have the same argument for the first two
20 elements with regards to the prejudice to good order and discipline
21 or the service discrediting, but with regards to the third element,
22 again, that's why we have to educate ourselves based on how the
23 government has pled it. In this case, the government has pled this

1 has been a disclosure of information by either wrongfully or wantonly
2 causing intelligence to be published on the Internet. And when you
3 look at how they pled this end date range that they pled this, it's
4 clear they were basically pleading this asked to all the other
5 specifications because what they're trying to bring and is,
6 basically, all the information that PFC Manning may have allegedly
7 disclose, either wrongfully or wantonly, to WikiLeaks over this date-
8 range period of time. The government, in oral argument before,
9 indicated that the video was an example of information that was
10 intelligence and that was their one way of getting around our
11 previous motion regarding this specification. But, they also
12 acknowledge to the Court that additional information falls within
13 this specification. They didn't indicate what information, but when
14 the Court looks at the date-range, it's clear it's all the other
15 specifications. All the information that they're charging, they're
16 bringing in under a general 134 offense. And as the defense laid out
17 the various reasons why this court did not find the 134 offense being
18 improper because of the Article 92 and the existence of the 380-5
19 regulation, is not problematic in this case because, again, when you
20 look at what do the elements mean, they define the *mens rea*, in this
21 case, by their alleging the specification as wanton or wrongfully.

22 "Wanton" is defined into other places within the Benchbook
23 and the definition is the same: it's reckless but may connote

1 willfulness or disregard of the probable consequences and thus
2 describing more aggravated offense. Thus, wanton, as alleged within
3 the clause one and two of the Article 134 offense, could potentially
4 include both knowing, willful, or negligent. So, even though, again,
5 it doesn't use identical statutory language, that's not problematic
6 in this case because it still can bring in the conduct that PFC
7 Manning is being alleged to have committed. And, again, just because
8 there are different ways of potentially proving the greater offense
9 is not problematic in this instance either because of the fact that
10 *Alston* and *Jones* indicate that it's not an issue if the greater
11 offense can be proven in a different way. The lesser included
12 offense, in this case, as pled, is still a lesser included offense.
13 If the greater offense has other elements such as could be published
14 was published or could be available to the enemy, that's not
15 problematic either because, again, the greater offense could have
16 additional elements. It's clear by the way, again, the government
17 has charged this that all three elements of an Article 92 offense
18 would fit under Specification 1 of Charge II. And, as such, if the
19 panel members consider PFC Manning being potentially guilty of this
20 offense, they should also have the ability to look at the potential
21 of a lesser included offense and that's what the defense is saying
22 our client has been placed on notice for and we're specifically
23 requesting this court to instruct on those lesser included offenses.

1 MJ: All right. Now, let's look at the government's lesser
2 included offenses. What's the defense's position on those?

3 CDC[MR.COOMBS]: Yeah, that would be in my response motion which
4 is at Appellate Exhibit 105. With regards to the Article 80s, here,
5 we would not dispute that, under certain circumstances, Article 80
6 could be a lesser included offense, but the--as alleged in this case,
7 we--I don't see Article 80 being a lesser included offense. It's
8 kind of similar to if you had someone charged with premeditated
9 murder; I don't think attempted murder would be a lesser included
10 offense if you actually had a deceased person. In this case, he's
11 being charged with disclosing information and, under the government's
12 theory, it rises to the level of espionage. But, that can't really
13 be an attempted espionage in this instance if government's theory is
14 the information was, in fact, disclosed.

15 MJ: So, I think--and if I understand your argument, then,
16 you're arguing to me that attempt can't be a lesser included offense,
17 but the offense, as charged, it's just--as they are charged, they are
18 completed offenses?

19 CDC[MR.COOMBS]: Correct, ma'am.

20 MJ: Okay, so it would be a raised by the evidence issue?

21 CDC[MR.COOMBS]: Exactly.

22 MJ: Okay.

1 CDC[MR.COOMBS]: With regards to the lesser included under the
2 641 offenses, we would concede that the misdemeanor offense of less
3 than a value of \$1000 could be a lesser included offense, certainly
4 in a federal court. The defense did not find anything to indicate
5 that when you brought in a clause three offense that you were limited
6 to the clause three offense. So, unless the Court were inclined to
7 indicate that you were limited to simply the clause three offense, it
8 would seem that when you bring a clause three offense, you bring in
9 the lesser included offenses to that.

10 With regards to the 1030 offenses--we'll have a motion
11 later, today on that--assuming they survive, then we would agree that
12 a general Article 134 offense would be a lesser included offense to
13 the 1030 offenses.

14 The 793 offenses and the 641 offenses, for arguments that
15 we previously raised, we would say are not lesser included offenses.
16 The 793 offenses, we would say, under the authority of *United States*
17 *v. Borunda*, and our argument, in this instance, why the 380-5 Article
18 92 offense has to be a lesser included offense, that the government
19 could not create a clause one and two offense as an LIO. With
20 regards to the 641 offenses, we would say, under our previous
21 argument, under *United States v. Kick*, that the government is
22 preempted from creating a larceny-like offense. It is unclear from
23 their motion what conduct they would allege for the first element

1 within the 134 offense, but it's clear from the 641 offense, in
2 general, it would have to be a larceny-type offense. And the *Norris*
3 opinion squarely is on point, here, indicating that the government
4 cannot create a 134 offense that is a larceny-type offense. Article
5 121 preempts the field in that--in this regard.

6 MJ: Now, talk to me a little more about--where in your brief
7 does it talk about--that you believe that Article 134 can be a lesser
8 included offense of 1030 specifications?

9 CDC[MR.COOMBS]: Within my brief, ma'am, its footnote one, the
10 very first page.

11 MJ: Okay.

12 CDC[MR.COOMBS]: There, I just concede that possibility of the
13 lesser includeds--I raise the issue of the attempt being not a lesser
14 included. I concede that the 641 and I concede the possibility of a
15 1030. I didn't see any other reason why, under--if the 1030 offenses
16 survive, why the members could not determine that PFC Manning--if
17 he's proven to have done what is alleged, did some conduct on his
18 computer that was prejudicial to good order and discipline or service
19 discrediting. So----

20 MJ: I'm just looking--I guess we'll get into this and
21 instructions, but for purposes--I'm looking at *Medina* which is the
22 lesser included offense the talks about Article 134 offenses and

1 holds that all three clauses are separate theories proving and

2 offense. So----

3 CDC[MR.COOMBS]: Yeah, the government, though, alleged the
4 clause one and two language within their charged offense, so that's--
5 I would agree that, had they left out the clause one and two language
6 and just went with a clause three offense, then they would be stuck
7 with the clause three. I think you avoid *Medina* because they alleged
8 the clause one and two language.

9 MJ: Now, what would the--what was the defense's position--would
10 be on the maximum punishment of such an offense, should I instruct it
11 as a lesser included offense?

12 CDC[MR.COOMBS]: With regards to just the 134 for the 1030s?

13 MJ: Yes.

14 CDC[MR.COOMBS]: We would say--and we're going to do this for
15 the next go around if, in fact, it survives--but we would say it is
16 akin to an Article 92 offense in this regard that some conduct that
17 was done that is prejudicial to good order and discipline so we would
18 say it's a 2-year max.

19 MJ: All right. And does the defense, specifically, want those
20 as an LIO?

21 CDC[MR.COOMBS]: For the 1030 offenses?

22 MJ: Yes.

1 CDC[MR.COOMBS]: Yes, ma'am, we would like to have all
2 applicable LIOs.

3 MJ: So the LIOs that you--that the defense would like--or would
4 request would be--I suppose and attempt, if it's raised by the
5 evidence?

6 CDC[MR.COOMBS]: Yes, ma'am.

7 MJ: The less than \$1000 for the 641 offense?

8 CDC[MR.COOMBS]: Yes, ma'am.

9 MJ: And the 134 clause one and two for the 1030(a)(2) offenses?

10 CDC[MR.COOMBS]: And the 380-5--the----

11 MJ: And the 380-5 for the 793(e) offenses?

12 CDC[MR.COOMBS]: Yes, ma'am.

13 MJ: Okay. All right. Thank you.

14 CDC[MR.COOMBS]: Thank you, ma'am. Government?

15 ATC[CPT WHYTE]: Your Honor, would you like me to address the
16 defense LIO----

17 MJ: Let's go exactly the way they did; let's use theirs first.

18 ATC[CPT WHYTE]: Okay. Your Honor, Article 92 is not a lesser
19 included offense for the 793 offenses for Specification 1 of Charge
20 II. The elements test is clear: first you must identify the
21 elements, either in the specification or in the statute, and then,
22 after those elements are actually defined, compare those elements to
23 determine whether or not the alleged lesser included offense is a

1 subset of the greater offense. All the elements of the lesser
2 offense are also elements of the greater offense and the lesser
3 included offense instruction is proper. Put another way: if it is
4 impossible to prove the greater offense without first proving the
5 lesser offense, then the lesser included offense instruction is not
6 proper. However, when a lesser included offense requires elements
7 not required for the greater offense, then no lesser included offense
8 is required.

9 MJ: How, in this case, would it be impossible to prove the
10 793(e) 134 offenses without proving a 92 violation?

11 ATC[CPT WHYTE]: The defense argues that the unauthorized
12 possession piece element of the 793 offense necessarily implicates
13 380-5. That is not correct. Not only is 380-5 not included in the
14 statute under the elements test or under the specification, again,
15 under the elements test, there are additional ways to prove
16 unauthorized possession. So, again, this is a fact--the defense is
17 arguing a fact-based argument not under the elements test, Your
18 Honor.

19 MJ: Okay.

20 ATC[CPT WHYTE]: So, again, with the defense's proposed LIOs of
21 Article 92--the elements of an Article 92 offense in violation of
22 380-5 require the existence of AR 380-5 and also the accused's duty

1 to obey that regulation. Here, the specification--neither the
2 specification nor the statute require those elements.

3 So, now, turning, Your Honor, to the government's proposed
4 LIOs, again, following the same elements test outlined in *Jones*, the
5 Court mentioned the *Medina* case--the Court of Appeals for the Armed
6 Forces case--and, in that case, they determined that clauses one and
7 two of Article 134 are not inherent lesser included offenses of a
8 clause three offense but, instead, depending on the specification,
9 they may be. Here, clauses one and two are actually included in the
10 specification, so, accordingly, they should be considered a lesser
11 included offense.

12 MJ: Now, do you read *Medina*--because it does say that----

13 ATC[CPT WHYTE]: No, it's----

14 MJ: ----for Article 134, they may be lesser included offenses.
15 So, do you read the language where it says, "Similarly, in a
16 contested case, the reviewing court," because, here, they're
17 considering it on appeal, "must consider whether or not the
18 prosecution proceeded on a premise or theory that the conduct alleged
19 under clause three was also prejudicial to good order and discipline
20 and service discrediting." Here, they're considering whether to
21 affirm it. "In such case, the members will have normally been
22 instructed as to the alternative theory." So, in this case, the
23 government is arguing that, because you have both--all three clauses,

1 one, two, and three, you can have the separate lesser included
2 offense instructions for clauses one and two?

3 ATC[CPT WHYTE]: Yes, ma'am.

4 MJ: And what is the governments view of the maximum punishment
5 that you would apply under such a lesser included offense, should I
6 give it?

7 ATC[CPT WHYTE]: It would be akin to a 793 offense, ma'am; it
8 would be a 10-year offense for the maximum.

9 MJ: All right. That would be a motion for----

10 ATC[CPT WHYTE]: Yes, ma'am.

11 MJ: ----the next time. Okay. Proceed.

12 ATC[CPT WHYTE]: Your Honor, so the defense's main argument that
13 clauses one and two are not lesser included offenses of the 793. It
14 relies on the *Borunda* case which, actually, we've already discussed
15 in prior motions, Your Honor. The *Borunda* case was an Air Force
16 Court of Criminal Appeals case and, in that case, they ruled that
17 when a lawful general order or regulation prescribing certain
18 misconduct exists, and that order or regulation is punitive, that
19 misconduct, if charged, will only survive legal scrutiny as a
20 violation of 92, not as an Article 134 offense. The issue, here, is
21 not whether or not the 793 offense, as charged, is a 92 offense; the
22 Court, in *McGuinness* foreclosed that issue. Instead, the defense is
23 arguing that a proposed lesser included offense, not addressed in

1 *Borunda*, should be an Article 92 offense to the exclusion of Article
2 134. The prosecution position is you cannot read--you should not
3 read *Borunda* to apply the lesser included offense, but, instead, to
4 the actual charged offense as the language in *Borunda* indicates.

5 Further, even assuming that *Borunda* does apply to the
6 lesser included offenses, the issue is whether or not the conduct
7 underlying the clause--the lesser included offense of clause one and
8 two is a violation of 380-5. If the panel does not find that the
9 information for the specifications where it is alleged that the
10 information is classified, for instance, and that is national defense
11 information--if the panel does not conclude that it is class--it is
12 neither classified nor national defense information, it would fall
13 outside the purview of 380-5.

14 And, Your Honor, just to----

15 MJ: Okay, let me--now, I'm getting a little confused. Okay.
16 So, we have does 793(e)--and what would your lesser--look at the
17 793(e) specification. What would the drafting be of the lesser
18 included offense under Article 134 under your theory?

19 ATC[CPT WHYTE]: I'm sorry, could you repeat that?

20 MJ: What would be--what would the offense be if it was a lesser
21 included offense in violation of Article 134?

22 ATC[CPT WHYTE]: Under the defense's argument of *Borunda*?

1 MJ: No, under the government--I instruct on a lesser included
2 offense for Specification 3 of Charge II under clauses one and two of
3 Article 134. How would you have that offense read?

4 ATC[CPT WHYTE]: I think that would be an issue in instructions
5 when we get to that, Your Honor. And I--the government is--will be
6 prepared, at that time, to argue the actual instructions that should
7 be given for that lesser included offense, but, here, when you're
8 talking just the elements test, there should be a lesser included
9 offense and then, again, the instructions, when we get to that phase
10 in the motions practice, then we'll be ready to argue.

11 MJ: All right. I guess, maybe, I'm confused, here. What I'm
12 looking at would be--would it be the wording of the specification
13 with the language "in violation of 18 U.S. Code section 793" as the
14 portion that's omitted from the specification? Maybe I misunderstood
15 you; I thought you were taking out different parts of the
16 specification when doing lesser included offense. For example,
17 unauthorized possession, possession of information related to the
18 national defense, is it the government's position that that language
19 can be--is going to be struck out in these lesser included offenses?

20 ATC[CPT WHYTE]: It could be, Your Honor, for a lesser included
21 offense, yes, ma'am.

22 MJ: So, is the government proposing multiple national security-
23 -or is it multiple unauthorized--or lesser included offenses with--

1 for example, excepting "unauthorized possession," excepting "relation
2 to the national defense"?

3 ATC[CPT WHYTE]: The government argued that, if the panel does
4 not find that the information, if the specification alleges so, is
5 classified and that it's national defense information, that it would
6 fall outside of the defense's theory that it could only be an Article
7 92 or that *Borunda*, rather, precludes the clause one and two
8 elements. So, the government's position with--regarding to the
9 language of the lesser included offense, we would argue would be an
10 issue when we get to instructions, Your Honor, and the government
11 will be ready at that time.

12 MJ: All right. Proceed.

13 ATC[CPT WHYTE]: And, Your Honor, just very briefly, to comment
14 on the 641 issue, the defense argues--and I know we've already dealt
15 with the preemption doctrine before, Your Honor, so I'll spare your
16 time on what is the preemption doctrine analysis, but, here, the
17 accused--the misconduct is not punishable by Article 121. Besides,
18 the accused is charged with--is not charged with compromising
19 tangible property like Article 121 punishes, so this actually would
20 fall outside the purview of Article 121 which the defense argues
21 preempts the 641 offenses. Your Honor, if you--the Benchbook does--
22 under the 121 portion of the Benchbook, it does specify that in note
23 19. It's 3-46-1 regarding larceny, Article 121.

1 MJ: All right. Now, what's the government's position on
2 attempt?

3 ATC[CPT WHYTE]: The government relies on its motion regarding
4 the attempt--that the case of *United States v. Brown* confirms that an
5 attempt is a lesser included offense under the elements test and this
6 is an issue--this is--the defense argues a fact-based argument not
7 under the elements test.

8 MJ: I think the defense agrees that an attempt can be a lesser
9 included offense. All right, I guess it's just an issue of whether
10 it's raised by the evidence. Okay.

11 ATC[CPT WHYTE]: Yes, ma'am. Subject to your questions.

12 MJ: I think I asked them. Yes?

13 CDC[MR.COOMBS]: Just briefly, Your Honor, I--not really to
14 respond to anything that the government raised, but to direct the
15 Court to the portion of the *Arriaga* case that references both the
16 statutory elements and the elements as charged. It would be on page
17 six if you printed from Westlaw--I guess it's--I'm looking for a pin
18 cite--but it's--within the analysis of the Court it indicates that---
19 -

20 MJ: Give me just a second to pull *Arriaga*, here.

21 CDC[MR.COOMBS]: Sure, ma'am. It's right above footnote--or I
22 guess the--issue five that's addressed in the opinion by the pin
23 cites.

1 MJ: All right. Issue five and you said--I'm sorry, what page
2 is it on?

3 CDC[MR.COOMBS]: It should be page six if you printed it from--
4 you'll see where it says, "The burglar specification" and it details
5 the specification.

6 MJ: Maybe it's--my page five is different than yours is. I
7 have "Discussion A" and "Lesser Included Offenses." Where are you in
8 relation to that?

9 CDC[MR.COOMBS]: Do you see where it lays out the elements for
10 burglary?

11 MJ: Oh, yes. Okay. We're on page seven. Okay.

12 CDC[MR.COOMBS]: So, it lays out the elements of burglary and it
13 takes a look at, as charged, and there the Court says, "Regardless of
14 whether one looks at--strictly to the statutory elements or to the
15 elements as charged, the house breaking is a lesser included offense
16 of burglary." And then it says, "Furthermore, the offense, as
17 charged in this case, clearly alleges the elements of both offenses."
18 So, in this instance, the way the CAAF was looking at this was not
19 only the statutory elements, but they were also looking as charged in
20 order to do their elements test and that's why it's so important for
21 this court to do the same thing when it takes a look at the 793
22 offenses.

1 MJ: All right. I will highlight that and take that into
2 consideration.

3 CDC[MR.COOMBS]: Thank you, ma'am.

4 MJ: All right. Anything else with respect to the lesser
5 included offense issue?

6 CDC[MR.COOMBS]: Nothing from the defense, Your Honor.

7 ATC[CPT WHYTE]: No, Your Honor.

8 MJ: All right. This is probably a good time to break for lunch
9 unless the parties have anything else that you would like to raise at
10 this time?

11 CDC[MR.COOMBS]: No, Your Honor.

12 TC[MAJ FEIN]: No, Your Honor.

13 MJ: All right. How long would you like?

14 CDC[MR.COOMBS]: Until 1330, Your Honor.

15 MJ: All right. Court is in recess until 1330.

16 **[The Article 39(a) session recessed at 1154, 7 June 2012.]**

17 **[The Article 39(a) session was called to order at 1337, 7 June 2012.]**

18 MJ: This Article 39(a) session is called to order. Let the
19 record reflect that all parties present when the Court last recessed
20 are again present in court.

21 All right, at issue, now, is the defense motion to dismiss
22 for specifications charging violation of Title 18, United States Code
23 section 1030.

1 CDC[MR.COOMBS]: Ma'am, that should be appellate Exhibit 90 and
2 92 for the defense.

3 MJ: All right. That would be Appellate Exhibit--90 as the
4 Defense Motion to Dismiss for Failure to State an Offense:
5 Specifications 13 and 14 of Charge II. Appellate Exhibit 91 is the
6 Government Response to the Defense Motion to Dismiss Specification 13
7 and 14 Of Charge II. And Appellate Exhibit 92 is the defense reply.
8 Give me one moment.

9 CDC[MR.COOMBS]: Not a problem, ma'am.

10 MJ: All right. Please proceed.

11 CDC[MR.COOMBS]: Ma'am, the defense requests this court to
12 dismiss that 18 U.S.C. 1030 offenses, Specifications 13 and 14 of
13 Charge II, for failing to state an offense. The government alleges
14 that PFC Manning exceeded his authorized access when he violated his
15 terms of use in accessing information on a computer. Even if that
16 were true, that would not stay an offense under 18 U.S.C. 1030. This
17 motion and, pretty much, the specifications turn on what does the
18 term "exceeds authorized access" mean for purposes of 18 U.S.C. 1030.
19 And when the Court is trying to determine the meaning of the statute,
20 *United States v. Starr*, the military case that we cited, controls,
21 for statutory interpretation. And, in accordance with *Starr*, and I
22 will use my opportunity, at this point, to go through the guidance
23 that *Starr* provides in order to argue why this court should, in fact,

1 dismiss the two specifications. I'll first start off discussing the
2 plain language of the statute, then I'll go to legislative history,
3 then the case law, then the Rule of Lenity, and then, finally, the
4 constitutional implications of the government's interpretation.

5 So, starting first, ma'am, with the plain language of 1030,
6 Congress defines, within section--18 U.S.C. 1030(e)(6), what the term
7 "exceeds authorized access" means. And under that provision,
8 Congress states that the term "exceeds authorized access" means "to
9 access a computer with authorization and to use such access to obtain
10 or alter information in the computer that the accessor is not
11 entitled so to obtain or alter." That's the definition that's
12 applied for 18 U.S.C. 1030 and its intended to apply to all the
13 sections within 18 U.S.C. 1030. This language is plain and
14 unambiguous and, what it basically says is that you exceed your
15 authorized access when you go to someplace within the computer,
16 bypassing, perhaps, a technical restriction or by hacking into the
17 computer and obtaining information that you do not have authorized
18 access to. For instance, if my client had used his access on the
19 SIPRNET to hack into another section of the SIPRNET that he did not
20 have authorization to by either going around the password
21 requirements by somehow guessing at the password; that would be an
22 example of exceeding authorized access under 1030. 1030 is not
23 intended to address misappropriation of information or misuse of a

1 computer. It is intended to address unauthorized access through a
2 computer; that's the purpose of 1030. It's clear, it's unambiguous
3 and the defense would argue that, based upon that, then the
4 allegations of the government of exceeding a term of use does not
5 state an offense.

6 If the Court believes that the terminology within
7 1030(e)(6) is not unambiguous, then you would go to the legislative
8 history in order to determine what did Congress mean by that section.
9 In this instance, the legislative history squarely supports the
10 defense's interpretation. In 1984, 1030 was enacted and, going back
11 to that time period, 1984, that's really when we had the explosion of
12 computer use. So, Congress was attempting to address a crime that
13 had not really been previously on the books and that was hacking into
14 computers. It was basically trying to go after computer hackers.
15 But, within the 1984 version, it stated the following: "A person who
16 knowingly accesses a computer without authorization," that's the
17 first way or, the second way, "Having access to computer with
18 authorization, uses the opportunities such access provides for
19 purposes to which such authorization does not extend." The 1984
20 version would have, in fact, supported the government's
21 interpretation now. But Congress amended that in 1986 and they
22 replaced that phrase "or having accessed a computer with
23 authorization, uses the opportunity such access provides for purposes

1 to which such authorization does not extend," with the phrase, "or
2 exceeds authorized access." And when you look at the legislative
3 history behind that, it's clear that Congress's intent was to
4 eliminate the misappropriation aspect of 1030. And when you look at
5 the change, at least from the Senate report, which the defense cited,
6 both from Senators Mathais and Leahy, they commented favorably on the
7 change of substituting the words "exceeds authorized access" for the
8 pre-1986 language and they stated this would eliminate coverage for
9 unauthorized access that aims at purposes to which such authorization
10 does not extend. This removes from the sweep of the statute one of
11 the murkier grounds of liability under which a federal employees
12 access to computerized data might be legitimate in some
13 circumstances, but then another circumstances, criminal. And when
14 you look at that, what they're basically saying is, "We eliminated
15 the ground that would require somebody to take a look at the
16 subjective intent of somebody."

17 MJ: Let me ask you a quick question on that one. I've got the
18 government brief and it says that that portion that you just read to
19 me was only applicable to 1030(a)(3) or--1030(a)(3) not 1030(a)(1) or
20 (2). Can you address that?

21 CDC[MR.COOMBS]: Well, with regards to that language--the
22 change, when Congress made the change, that's when they put in
23 1030(e)(6), "exceeds authorized access," and that was intended, then,

1 to provide the definition to all the other sections. So, they may be
2 correct that, initially, that language was only applicable to that
3 particular section--which even would further bolster the defense's
4 position that that was the section where Congress was concerned about
5 somebody, basically, misappropriating information. But then,
6 Congress decided to eliminate that entire aspect of it because it
7 does turn on the subjective intent of the person. So, if I go to a
8 computer and I access information and then, later, decide, you know,
9 I'm going to use it in an improper--an inappropriate way that the--my
10 authorization for use doesn't apply, I have not committed a 1030
11 offense. But, if somebody else, when they access that information,
12 apparently, has that improper purpose in their mind with a very
13 subjective intent, they have committed a 1030 offense. And when
14 Congress looked at that, that's the murkier grounds of liability they
15 were concerned about. And by eliminating that, they make this not a
16 misappropriation statute or a misuse statute, where there are plenty
17 of laws on the books to address that, they left this as an
18 unauthorized access statute; a computer hacking statute. Congress
19 even further clarified this change in 1996 when it, very helpfully,
20 for the defense's purposes, clarified the interplay between the
21 section of the 1030 and the espionage statute. They stated that
22 1030(a)(1) would target those persons who deliberately break into a
23 computer to obtain properly classified government secrets and then

1 try to peddle those secrets to others, including foreign governments.
2 In this sense, then, it is the use of the computer which is being
3 proscribed, and not the unauthorized possession of, access to, or
4 control over classified information. So, again, Congress indicated
5 that, "Look, we've got espionage statutes addressing misappropriation
6 of information, misuse of information. This 1030 is designed to
7 address unauthorized access; the breaking into a computer.

8 When you look at even the definition of--well, actually
9 they--the name of the statute, the Computer Fraud and Abuse Act, this
10 isn't the Misappropriation of Information Act, this is the Computer
11 Fraud and Abuse Act. And when you look at it, it really is very
12 similar to our trespass laws for real property, we have trespass laws
13 for real property and then we have larceny for the personal property
14 that you might steal. So, if you go on somebody's land, you might
15 have committed trespass, if you didn't have authorization. If you
16 till something from there, then you've committed a larceny. Here,
17 this was Congress's way of giving a trespass statute for computers.
18 You go into a computer that you're not authorized to, you have
19 committed a trespass. You've committed a violation of the Computer
20 Fraud and Abuse Act. If you, then steal something from there or
21 misappropriate the information in some way, you might have committed
22 some other offense--in this case, that may be a 730 offense, 793
23 offense, it may be a 380-5 offense, but it certainly is not a 1030

1 offense. This is also kind of similar to the idea of--if Your Honor
2 would entertain burglary, for example. If you are a person who goes
3 to somebody's house at night, without authorization, with intent to
4 commit a crime, and you break in, you've committed a burglary. If
5 you go to person's house at night, being invited, even with intent to
6 commit an offense, and you steal something inside of the house, you
7 haven't committed a burglary, you've committed a larceny because you
8 had an invitation to come into the house. It's no different, here.
9 The government is not going to contend that PFC Manning did not have
10 the authorization to go to that particular area to look at that
11 information; there was no tasker, there is no hacking in, there was
12 no bypassing any technical restrictions. They're just going to rest
13 on the idea that he violated his terms of use. That is not what the
14 1030 was designed to address.

15 MJ: So, it's the defense's position, then, that the use banner
16 that the accused accessed as he was going in, it's not an
17 unauthorized access?

18 CDC[MR.COOMBS]: That is correct, ma'am. Because that--and the
19 government says something like "explicit, implicit" and they try to
20 make a--by definition, a distinction that is really there, but the
21 terms of use that you may have--you may violate terms of use, but
22 that is not the unauthorized access that 1030 was designed to
23 address. And I'll actually--when I get to the implications of the

1 government's position, I can show that more fully. So,
2 notwithstanding the actual statute being in plain and unambiguous--
3 and looking at the legislative history clearly indicating what
4 Congress was intending to do, case law also supports the defense's
5 position in this regard, most notably, the Ninth Circuit, just over a
6 month ago, decided the *Nosal* case and in that case, the Ninth
7 Circuit, *en banc*, considered this very issue: "What does 'exceeds
8 authorized access' mean?" And the Court stated that "exceeds
9 authorized access, within the Computer Fraud and Abuse Act, is
10 limited to violation of restrictions on access to information, not
11 restrictions on its use." The Ninth Circuit found that the
12 interpretation of "exceeds authorized access" to be more consistent
13 with the statutory language and the structure of the Computer Fraud
14 and Abuse Act as well as the legislative history. So, in this
15 instance, even the Ninth Circuit considering this indicated that this
16 is a "exceeds authorized access" not a "terms of use" or a
17 misappropriation statute.

18 Notwithstanding this, if you take a look at the other cases
19 that, in spite of the legislative history, in spite of Congress's
20 clear intent in the language of the statute of the *John* and *Rodriguez*
21 cases, which the defense gives to the government, these cases, the
22 defense submits, are wrongly decided and if the Court looks at that--
23 both cases, you'll see it's a very unsophisticated analysis by the

1 circuits. They don't address, at all, the legislative history and,
2 in fact, and most importantly, they do not even discuss the 1986
3 change to the statute where Congress supplanted the clear language
4 that addressed the improper use with "exceeds authorized access."
5 So, the case law in this regard and all the cases that we have sided
6 clearly support that this is a "exceeds authorized access" and not a
7 "terms of use" or misappropriations statute.

8 Now, in spite of the language, legislative history, and the
9 case law, if there is any ambiguity still left, then, as the Court
10 knows, you go to the Rule of Lenity. In this regard, the defense
11 submits that you wouldn't have to resort to the Rule of Lenity, but,
12 if the Court is going to go to that, then the Rule of Lenity requires
13 that, if there are two ways in which you can interpret a statute--one
14 that is more broad and one that is narrow--the Court should apply the
15 one that is narrow in order to sweep in the least amount of accused.

16 In this case, that's exactly what the Ninth Circuit did in
17 *Nosal*. It stated--and what this court should also determine--that if
18 Congress really wanted to make this a misappropriation-liability
19 statute where restrictions on term of use really control whether or
20 not you, in fact, committed a violation of 1030, then Congress should
21 have spoken more clearer language. Courts should resist the urge of
22 lifting the legislative pen in order to go with the government on its
23 argument that this is actually a misappropriation statute.

1 And, here, I'd like to talk about the expansive reading of
2 "exceeds authorized access." If we, in fact, go with what the
3 government would have this court determine, then you would have a
4 problem with 1030 not being internally consistent and, in fact, you
5 would have a problem with 1030 being unconstitutional, at least, in
6 one of its provisions because of interpretation. Again, 1030 has to
7 apply to all of the provisions and when you look at 1030(a)(2)(c),
8 that controls "exceeding authorized access by obtaining information
9 from a protected computer." Congress then defines a protected
10 computer as being, basically, any computer connected to interstate
11 commerce; the Internet. So, as *Nosal* went down that road of saying,
12 all the people who would be swept into this statute if it really were
13 a misappropriation statute, any time you violated a term of use of
14 any sort of computer, whether it be your employer or in banking or--
15 we've seen a case and we cited it where somebody lied about their age
16 and even their gender on a website and was prosecuted for that under
17 1030, the Ninth Circuit said no. You see, that is the concern; this
18 would be unconstitutionally vague in that regard. But even stepping
19 away from those types of thought processes, let's just go with the
20 government's banner where they say, "Look, because you go to that
21 computer and you see the little banner and you click 'Okay' and you
22 go forward, you immediately lose, apparently, your right to do
23 anything if you do anything inconsistent with your authorized use."

1 Well, if the Court wants to see a clear example of why that would not
2 really play out, all you have to do is look at Appellate Exhibit 56.
3 This is the prosecution's notice to the Court of the computer
4 forensics regarding the programs and the music and the videos that
5 was not authorized on a government computer. And this is just the
6 list of it from a very few amount of computers that we've been able
7 to find and do forensics on. So, presumably, every person, here, who
8 has downloaded a [sic] music or a video or some program has exceeded
9 authorized access under the government's version because they've done
10 something that the little banner that comes up there prohibits you
11 from doing.

12 MJ: Is there regulation that talks about when you can use
13 computers for personal use?

14 CDC[MR.COOMBS]: I believe--and this is going back to my admin
15 law days--but I believe it is 600-20 and----

16 MJ: I mean, that's where I'm going. I mean, is there--what
17 evidence do we have that it's not authorized to do that or----

18 CDC[MR.COOMBS]: Right. And I believe, within the regulation,
19 from my memory--and I'd have to check--but it talks about--that, you
20 know, the ordinary, quick--like a phone--lifting up a phone to call
21 home. Even though it's a government phone, we're going to allow
22 people to do that; we're not going to force them to go outside and
23 use their cell phone. Likewise, perhaps even, using your computer to

1 check your personal email might be fine. The problem, here, is that
2 is not what we have in that documentation; we have actual downloading
3 of videos, games, music; nothing that I've seen would authorize that.
4 And so, clearly, there, those Soldiers have exceeded their authorized
5 use, but they haven't committed a 1030 violation.

6 So, when you look at all of this, it clearly supports the
7 defense's position on how the Court should interpret 1030. But,
8 lastly, I'll end with academic commentary in this area, 1030, prior
9 to this case, was not something that the defense was even aware of.
10 And, as we started to educate ourselves on this, we quickly came
11 across Professor Orin Kerr. Professor Orin Kerr has probably thought
12 more about this section in this statute than anybody on this planet.
13 I mean, he has written extensively in this area and, as you do
14 research on him, you start to feel inadequate, given his age and his
15 accomplishments. But, as you look there, he clearly indicates that--
16 and he's our country's foremost expert in this field--"exceeds
17 authorized access should not be interpreted so as to allow for an
18 inquiry into whether the accuser had violated the computer owner's
19 terms of use. Rather, section 1030 should only capture whether the
20 user bypassed technical restrictions so as to access information that
21 he was not entitled to so access."

22 And then Professor Kerr creates what he calls "access that
23 circumvents restrictions by code." What he says is when a user

1 circumvents regulation by code, she tricks the computer into giving
2 her into giving her greater privileges than she's entitled to
3 receive. This normally can occur in two ways: first, the user can
4 enter the username and password of another with greater privileges,
5 or, second, the user can exploit a design flaw in the software that
6 leads the software to grant the computer user greater privileges than
7 they otherwise should be entitled. But what Orin Kerr says is the
8 use restrictions placed upon the computer by the employer does not
9 control whether or not you have a 1030 violation. And, really, when
10 you look at that, that's the only way you can make sense of the
11 Computer Fraud and Abuse Act. So, the defense requests this court to
12 consider motions that we've cited--in fact, we've probably written
13 more criticizing the *Johns* and *Rodriguez* case than the *Johns* and
14 *Rodriguez* case wrote to discuss the analysis that the government
15 wants you to support. But, ultimately, we ask that you dismiss these
16 two specifications for failing to state an offense.

17 MJ: Before you go, let me just ask you a couple of questions.
18 Any of those cases that--cited by either side deal with 1030(a)(1) as
19 opposed to the rest of the sections, to your knowledge?

20 CDC[MR.COOMBS]: No, ma'am, not to my knowledge. I think the
21 cases that we cite deal with just dealing with exceeds authorized
22 access. You do have quite a few criminal, but you also have it in
23 the civil section coming up quite often and I don't know what

1 1030(a)(1)--but the important aspect, here, is that that term within
2 (e)(6), as the *Nosal* court correctly determined, has to be applied to
3 all the provisions because Congress wrote that as the definition for
4 "exceeds authorized access" in defining all the other provisions.
5 So, it really doesn't matter whether or not the case is a 1030(a)(1)
6 or not when all you're trying to determine is what exceeds authorized
7 access.

8 MJ: Let me ask you one more question. The federal cases have
9 dismissed the charge out right before any evidence is heard, based on
10 Federal Rule of Criminal Procedure 12----

11 CDC[MR.COOMBS]: Right, ma'am.

12 MJ: ----to your knowledge, is there any military case or rule
13 that's comparable?

14 CDC[MR.COOMBS]: I would say--just when the judge is looking at
15 the specification, if even assuming the government's case--in this
16 case, assuming that PFC Manning--they can prove that PFC Manning saw
17 the user access--or user permission, said "yes," and then went to an
18 area that he was authorized to go to and obtain information, and even
19 assuming they could prove that, subjectively, he went there to obtain
20 that information with the requisite intent, all that being assumed,
21 this court still would make the conclusion that they haven't stated
22 an offense. So, in this case, then it would just be a failure to
23 state an offense--not an evidentiary issue because the defense would

1 be, for the purposes of this motion, conceding each of the facts that
2 the government would like to allege in this case; that there is a
3 user banner, that the individual saw it, that the individual went to
4 an area that he is authorized to go to but went there with the
5 improper purpose, and then obtained the information. All that, even
6 assuming to be true, does not allege a 1030 violation. And so, as
7 the *Nosal* court said, the correct result in that should be a
8 dismissal of the offense, not a later 917 motion.

9 MJ: I guess that's where looking at this because the military
10 is a notice pleading jurisdiction. If the pleading alleges an
11 offense--I mean, I've seen no case law that does what the *Nosal* court
12 did in the military. Do you--are you aware of any?

13 CDC[MR.COOMBS]: Well, I think--I'd have to get back to see if I
14 can find some of that. I would probably say, though, under R.C.M.
15 801, the inherent authorities within the military judge's power, when
16 the judge is looking at how these rules should be interpreted. You
17 also look at R.C.M.--I believe it's 103--that the R.C.M.s and M.R.E.s
18 have to be interpreted in order to achieve a just outcome. If the
19 government were alleging a specification that, if the Court said,
20 "Look, Government, I assume all the facts you want me to, you're not
21 alleging an offense then. You haven't alleged--even assuming your
22 facts, there's no way I could let a panel come back with a finding of
23 guilty on that." Then, the issue of justice in this case would be an

1 accused should not be facing an offense that the Court already knows
2 would never survive a 917 motion, right out of the gate. If there's
3 a factual issue that may, I guess, go over that hurdle of 917, then,
4 the Court should, in fact, wait to see what a panel does and then see
5 how the facts play out. But, in this instance, assuming every fact
6 that the government would ever want to hope for with regards to the
7 access, as far as the user privileges and whatnot, there is nothing
8 that they are alleging that PFC Manning did that falls within the
9 violation of 1030. So, if you took 1030 out of play and you said
10 they alleged that he committed a one--let's say a murder offense, and
11 you asked, "Well, who's the person you're saying he killed?" And
12 there is no facts, no support, no information; this court would not
13 allow the government to start its case with--even though they might
14 have alleged a specification that, on its face, looks fine, but once
15 you see their supporting facts or theory for it, even assuming all
16 the facts for them, this court would say, "No, I would grant a 917."
17 So, in this instance we would say that fairness would require the
18 specifications to be dismissed.

19 MJ: Thank you.

20 CDC[MR.COOMBS]: Thank you, Your Honor.

21 ATC[CPT MORROW]: Your Honor, the government opposes the defense
22 motion to dismiss Specifications 13 and 14. The government's theory
23 that the accused exceeded authorized access under 18 U.S.C. 1030 is

1 consistent with the statutory text, the legislative history, and case
2 law interpreted reviews. Before the government begins argument on
3 those three points, it might be helpful to restate its theory on
4 exceeding authorized access.

5 During the Article 32 investigation, the government
6 presented evidence relating to the limitations on the accused's
7 access to government computers. The first was the warning banner, as
8 the defense and the Court discussed earlier and that warning banner
9 was on both of the accused's SIPRNET computers. Every time the
10 accused logged on to his SIPR--his government computer with a
11 username and password, he was presented with that warning banner.
12 And the first sentence that--that warning banner stated the
13 following: "You are accessing the United States Government (USG)
14 information system that is provided for U.S. Government authorized
15 use only." Before proceeding, the accused was required to click
16 "Okay" on that warning banner and that's enclosure two to the
17 government's brief.

18 MJ: Let me just stop you there for a second. The hypothetical-
19 -the facts that the Ninth Circuit, basically, in *Nosal*, and the
20 defense argument to me with showing me Appellate Exhibit 56--so, any
21 Soldier who accesses a computer and puts a song on the computer can
22 now be prosecuted on this statute?

1 ATC[CPT MORROW]: Well, the government's position, in that case,
2 Your Honor, would be that they didn't--because they downloaded a--
3 they're deployed, they download a song while they're sitting in the
4 SCIF, that doesn't necessarily mean they accessed the computer for an
5 improper purpose; that's something entirely different. That may be,
6 "Geeze, you shouldn't have music on your computer," but accessing
7 your computer for an improper purpose and then going and downloading
8 250,000 cables is something entirely different.

9 MJ: I understand that. I'm looking at the definition as
10 applied to every section of that statute.

11 ATC[CPT MORROW]: I understand that, Your Honor.

12 MJ: Is the government suggesting that I should look differently
13 at different sections of that statute?

14 ATC[CPT MORROW]: No, I'm not. I'm suggesting that, in that
15 case, in that--if, indeed, the purpose of the individual, at the time
16 they accessed the computer, was to obtain information from another
17 protected computer and not--again, I don't know--you know, that's not
18 necessarily a protected computer. I don't know how music becomes a
19 protected computer, but that's what, at least, 1030(a)(2)(c) says.
20 The statute is intentionally or--I'm not going to read it--but it's
21 intentionally--one moment, Your Honor. It's intentionally accessing
22 the computer without authorization or exceeds authorized access and
23 thereby obtains information from any protected computer.

1 First of all, at least in that--the example presented by
2 Mr. Coombs, I don't think a SIPRNET computer affects interstate
3 commerce which is what a protected computer is under the definition,
4 but--I mean--there's a--that's a radical in my opinion but----

5 MJ: Okay. All right.

6 ATC[CPT MORROW]: Additionally, the accused and members of the
7 unit were required to sign a user agreement or an acceptable use
8 policy prior to being granted access to the NIPRNET and SIPRNET and,
9 in fact, the S-6 section of the accused's unit used the signed AUPs--
10 so, Acceptable Use Policies of Soldiers to create network accounts.
11 And the Army's sample AUP, which was provided in the government's
12 brief, requires users to sign a document that states that "Access to
13 this/these networks is for official use and authorized purposes."
14 So, again, that's two separate limitations--for this case,
15 limitations on the accused's access to computers.

16 So, with that said, the government's theory is simply
17 stated as this: because the accused's access to SIPRNET computers
18 was governed by a purpose-based limitation or access restriction, the
19 accused exceeded his authorized access when he access to SIPRNET
20 computers for a non-authorized or improper purpose.

21 For once, the defense and government can agree on each
22 other's statutory interpretation, so I'll just move to the statutory
23 text first. The starting point, as the defense noted, is the plain

1 ordinary meaning of the language. Under 1030(e)(6), as the defense
2 stated, "exceeds authorized access" means to access a computer with
3 authorization and to use such access to obtain or alter information
4 in the computer that the accessor is not entitled so to obtain or
5 alter. So, the basic difference between the United States and the
6 defense is this: the government maintains and believes that some
7 effect must be given the word "so" in the definition. It must have
8 some independent meaning and, as such, the only reasonable effect to
9 be given to "so" is that "so" means in the state or manner indicated
10 or expressed as defined by *Websters*. And, given that meaning, an
11 individual exceeds authorized access when he or she obtains or alters
12 information that he or she is not entitled to obtain or alter in
13 those circumstances were in that manner.

14 The individual user may have been entitled to obtain
15 information in some other circumstances, but not in that manner under
16 those circumstances. And, with that definition would do is, it would
17 encompass a scenario where an insider bypasses some technical
18 restriction, so, in that manner--and the scenario where an insider
19 uses or accesses his computer for an improper or unauthorized purpose
20 which would be the--in those circumstances.

21 To dissent, the defense believes this court should read the
22 word "so" entirely out of the definition of exceeds authorized
23 access. The government maintains that this court should find that

1 that's in--that effects should be given to all the statutes provision
2 so that no part is inoperative or superfluous.

3 MJ: Was the government's position with respect to the *Nosal*
4 case where they discuss that the word "so" can have a variety of
5 meanings on page four?

6 ATC[CPT MORROW]: That's true, Your Honor, and I can talk about
7 *Nosal*, right now, if you'd like, but I think there are serious flaws.
8 In my humble opinion, I think the opinion is flawed. First, they
9 agree, so "so" can be given any number of opinions and, in fact, what
10 the *Nosal* court said is that the definition of exceeds authorized
11 access is actually susceptible to the government's interpretation;
12 it's right there on their--in their opinion. So, this is what they
13 started with: they said, "So 'so' can be given some meanings so,
14 basically, it's ambiguous." And, instead of, as the basic job of
15 statutory interpretation says, instead of taking that ambiguous--what
16 they believe is ambiguous language and moving to the legislative
17 history, they did an end around and they started talking about all
18 these other--all the other ways that, as the defense agrees or
19 thinks, that the statute is unconstitutionally vague or problematic.
20 So, in that sense, they really did not consider legislative history.
21 I know, you know, the defense believes they did consider the
22 legislative history, but there are parts of legislative history that
23 are very important to this case and to this court's analysis that

1 they did not even cite or consider and the defense didn't cite 44
2 pages of single-spaced brief.

3 MJ: And what would those be?

4 ATC[CPT MORROW]: In 1984, the predecessor to the Computer Fraud
5 and Abuse Act was the Counterfeit Access Device and Fraud and Abuse
6 Act. And so, that version punishes, as the defense stated, "whoever,
7 having access to a computer, with authorization, uses the opportunity
8 such access provides for purposes to which this authorization does
9 not extend." And as the defense conceded, if we were before this
10 court in 1984 and that was the language used in the statute, there
11 would be no question that the alleged misconduct in this case would
12 fall squarely within the parameters of the statute.

13 So, in 1986, Congress passed the CFAA, the Computer Fraud
14 and Abuse Act, and that act provides and added to 18 U.S.C. 1030 and,
15 at that time, the term "exceeds authorized access" was introduced to
16 1030(a)(1) and (a)(2) and the Senate report for the 1986 bill
17 explained the introduction in this way and that's on page 2486 of the
18 report. Section 2(c), substitutes the phrase, "exceeds authorized
19 access" for the more cumbersome phrase in present 18 U.S.C.
20 1030(a)(1) and (2), "or having accessed the computer with
21 authorization, uses the opportunity such access provides for purposes
22 to which such authorization does not extend." "The committee intends
23 this change to simplify the language in 18 U.S.C. 1030(a)(1) and (2)

1 and the phrase "exceeds authorized access" is defined separately in
2 section 2(g) of the bill." That's the full committee's report, Your
3 Honor. What the defense noted--or what the defense cited for this
4 court was the additional views of two senators on the Judiciary
5 Committee speaking--and, as you noted, speaking, from the
6 government's perspective, solely about 1030(a)(3).

7 MJ: Well, where's your evidence of that? I mean----

8 ATC[CPT MORROW]: Well, it's right there. I mean, to me, it's
9 plain on its face, Your Honor. I mean, they were talking--we want to
10 talk about----

11 MJ: Is that included----

12 ATC[CPT MORROW]: ----senators----

13 MJ: ----I'm sorry, is that legislative history included
14 anywhere as an attachment for me to look at?

15 ATC[CPT MORROW]: It's not as an attachment, Your Honor, it's
16 cited to the--it's 16 pages--it's actually pretty short. I mean, you
17 could read it in 30 minutes, but we can provide that to you--our
18 copy.

19 MJ: I'd appreciate that, thank you.

20 ATC[CPT MORROW]: Okay. It's worth emphasizing again, so, as I
21 just stated, Congress substituted the phrase for the more cumbersome
22 phrase in the 1984 version and they intended that change to simplify
23 the language. And, as I stated earlier, the defense wants the Court

1 to focus on a comment plucked from another section of the Senate
2 report. So, if I can just describe that--we'll provide this
3 afterwards, Your Honor--but the Senate report was, essentially two
4 sections: it was the full committee's report and then it was the
5 additional views of Senators Mathias and Leahy. And, as stated
6 earlier, that section was actually quoted to 1030(a)(3), and you can
7 see clearer--and, in fact, the full committee even addresses this as
8 well--the senators had specific concerns about 1030(a)(3),
9 specifically with respect to the criminalizing a federal employee
10 who, for example, is responding to a FOIA request and uses their
11 government computer to access their information that, technically,
12 they are not entitled to access. And so, the full committee report
13 that--explained that fear in this way: "The committee wishes to be
14 very precise about who may be prosecuted under the new subsection
15 (a)(3)." So, the new subsection--let me just back up for a second.
16 The new subsection (a)(3) removed "exceeds authorized access" from
17 that provision. It only became a "without authorization" provision.
18 The committee--and I'm quoting--"The committee was concerned that a
19 federal computer crimes statute not be so broad as to create a risk
20 that government employees and others who are authorized to use a
21 federal computer would face prosecution for acts of computer access
22 and use that, while technically wrong, should not rise to the level
23 of criminal conduct." So, what the new (a)(3) did was it limited

1 prosecutions to those without authorized access to federal computers
2 and, in doing so, it removed what Senators Leahy and Mathias
3 described as the "murkier ground for liability" under (a)(3) only.
4 So, it removed--again, it removed "exceeds authorized access" from
5 (a)(3) only. And we know that Congress clearly intended "exceeds
6 authorized access" to be bypassing--the more than bypassing some
7 technical restriction, as the defense alleges. On the same page of
8 the report from the senate bill--so, that's 2485 of the report--
9 discussing the removal of a predecessor to "exceeds authorized
10 access" from subsection (a)(3), the committee explained that removal
11 in this was: "It is not difficult to envision and employ your other
12 individual who, while authorized to use a particular computer in one
13 department, briefly exceeds his authorized access and peruses data
14 belonging to a department that he's not supposed to look at." That
15 doesn't indicate bypassing some technical restriction at all.

16 And so, the government maintains, Your Honor, that the
17 legislative history is very clearly--very clearly supports the
18 governments interpretation of "exceeds authorized access" and what
19 this really amounts to, Your Honor, is the United States is asking
20 this court to rely on the holding of a full senate report and the
21 defense is asking this court to, essentially, cite--or rely on *dicta*
22 in a concurring opinion.

1 As per case law, Your Honor, I've--I think I've already
2 been over this, but, as you're aware, there is a circuit split on
3 this issue. The Fifth and Eleventh Circuits have adopted the
4 government's interpretation and the Ninth Circuit and the *Nosal* case
5 has adopted the defense's interpretation.

6 MJ: Well, Captain Morrow, again, I haven't looked at every case
7 involving this issue, but I did read the law review articles that
8 were provided. Does the government agree--I mean, it's about kind of
9 a half and half split on the case on the cases, right now?

10 ATC[CPT MORROW]: Are you-----

11 MJ: With the circuits split, agreeing--the Ninth Circuit----

12 ATC[CPT MORROW]: Yeah, it's the-----

13 MJ: ----is----

14 ATC[CPT MORROW]: ----about--I would say it's about----

15 MJ: ----the only circuit, but if you add the state courts in
16 there, you have, basically, a lot of courts on one side and a lot of
17 courts on the other side.

18 ATC[CPT MORROW]: I agree with that, Your Honor.

19 MJ: Okay.

20 ATC[CPT MORROW]: I mean, absolutely.

21 MJ: Okay.

22 ATC[CPT MORROW]: But, again, I think that--or the government
23 maintains that, in our humble opinion, the *Nosal* court is--their

1 reasoning is flawed and--basically, for the reasons I stated earlier.
2 They really didn't use sort of the directional method of statutory
3 interpretation--what we sort of--generally speaking, that's what
4 we're supposed to use to discern the intent of Congress. We begin
5 with the plain language, with the legislative history and if there is
6 some grievous or fatal ambiguity in the legislative history in the
7 statute, then, yes, the Rule of Lenity should apply. In this case,
8 the government maintains that there isn't any grievous or fatal
9 ambiguity in the legislative history; it's very clear.

10 With respect to academic commentary, I sort of skimmed over
11 Professor Kerr's article, but what was apparent to the government
12 from reading the article is that Professor Kerr believes that the law
13 should only criminalize bypassing some technical restriction. It's,
14 essentially, a proposal to make the law better and, again, that's not
15 this court's inquiry. This inquiry is to try to determine what
16 Congress meant by "exceeds authorized access" in the first place.
17 And, of course, we're not saying that the statute is perfect in every
18 respect, but, again, that's not for this court's inquiry.

19 Finally, Your Honor, the defense takes issue with trying to
20 discern a subjective intent of a user when accessing a computer. I
21 would just simply state that it is the Computer Fraud and Abuse Act.
22 Fraud requires us to look at the subjective intent of a person.

1 MJ: How do you address the legislative history in 1996 where
2 the Congress talks about the--"although there is considerable overlap
3 between 18 United States Code 793(e) and section 1030(a)(1), as
4 amended by the NII Protection Act, the two statutes would not reach
5 the same conduct. Section 1030(a)(1) would target those persons who
6 deliberately break into a computer to obtain properly classified
7 government secrets, then try to peddle those secrets to others,
8 including foreign governments. In other words, unlike in existing
9 espionage laws prohibiting the theft and peddling of government
10 secrets to foreign agents, section 1030(a)(1) would require proof
11 that the individual knowingly used a computer without authority, or
12 in excess of authority, for the purpose of obtaining classified
13 information."

14 ATC[CPT MORROW]: Where are you----

15 MJ: So, it's----

16 ATC[CPT MORROW]: I'm sorry, Your Honor.

17 MJ: ----"the use of the computer which is being proscribed, not
18 the unauthorized possession of, access to, or control over the
19 classified information, itself."

20 ATC[CPT MORROW]: I don't think there is anything inconsistent
21 with that. The government's not saying that--in fact--I mean, this
22 kind of goes to--well, it doesn't really go to that, but we are
23 criminalizing the use of the computer. In fact, in this case, we're

1 criminalizing the use of the computer that downloaded--allegedly
2 downloaded 250,000 records from one place and that's, essentially,
3 what's so dangerous about computers is the ability to download large
4 amounts of information. We're not talking about somebody--an
5 employee who takes a file, you know, to the copier room, makes some
6 copies, and sticks it in their coat and walks out. We're talking
7 about the use of a computer in a very dangerous way. So, in that
8 sense, I don't think there's anything inconsistent with the statement
9 in 1996. I guess we are criminalizing the use of a computer, but
10 we're criminalizing the use of a computer that, again, downloaded a
11 lot of classified information.

12 MJ: In looking at *Nosal*, there is two--that's a broad
13 definition and a narrow definition. The broad definition is that
14 "exceeds authorized access" applies to people who are authorized to
15 use the computer, but do so for an unauthorized purpose. The narrow
16 definition would "exceeds authorized access" would apply to inside
17 hackers, individuals whose initial access to a computer is
18 authorized, but who access unauthorized information or files. If I
19 were to give the narrow definition in my instructions, does the
20 government contend that its evidence would survive a 917 motion?

21 ATC[CPT MORROW]: Well, there are other considerations. I mean,
22 if that's the case, Your Honor, I mean, we'd like the ability to--I'd
23 like the ability to discuss that further. There are other

1 considerations in this case, namely, as the evidence will show, the
2 use of a non-authorized program to download information.

3 MJ: That's where I'm going with this----

4 ATC[CPT MORROW]: Right.

5 MJ: ----is the government bringing evidence---is there a contest
6 on whether the government's evidence would survive a----

7 ATC[CPT MORROW]: Well, I agree with the defense----

8 MJ: ----a 917 motion----

9 ATC[CPT MORROW]: ----in the respect that----

10 MJ: ----if I gave the narrow definition?

11 ATC[CPT MORROW]: I'm sorry, Your Honor.

12 MJ: No, go ahead. That's fine.

13 ATC[CPT MORROW]: Can you say that--I mean, I agree with the
14 defense with respect that, if we're not talking about some of the
15 other facts in this case, we're relying strictly on the warning
16 banner on and the acceptable use policy in establishing that the
17 accused accessed the computer for an improper purpose, if it's just
18 that, then, yes, I don't think the narrow definition--what I've
19 talked with the Court, today, about, I don't think that would survive
20 a 917. However, there are other facts in this case that, again, I
21 would--or the government would likely--if that's where the Court's
22 going, the government would like the ability to, at least--I'd like
23 to get the ability, at least, to talk that over with co-counsel.

1 MJ: Okay.

2 ATC[CPT MORROW]: Subject to your questions, Your Honor.

3 MJ: I think I've asked them. I would appreciate the full
4 legislative history in this case----

5 ATC[CPT MORROW]: Yes, ma'am, will get that.

6 MJ: ----For the statute. Thank you.

7 CDC[MR.COOMBS]: Just briefly, Your Honor, with regards to the
8 government's "so" argument indicating that this court should ascribe
9 a definition to the word "so," this--it's important to see where the
10 government's argument came from. This argument--no court has raised
11 this argument other than *Nosal* (1). *Nosal* (1) was a court that gave
12 the government its argument and then an *en banc* court, in very short
13 order, reversed *Nosal* (1). So, the government's argument of "so" and
14 ascribing a definition to that two-letter word and making it carry
15 all the weight to make this now a misappropriation act--the only case
16 that has ever looked that way--and that's, apparently, the
17 government's legislative history of why this, now, should be
18 interpreted that way, was *Nosal* (1), which *Nosal* (1) said that that
19 two-letter word carried the day and then, again, the *en banc* court
20 came back quickly and said "No."

21 The other two cases that the government, primarily, relies
22 upon, the *John* and *Rodriguez* case, neither one of those cases cite
23 the word "so" as being important to the statutory interpretation.

1 Not only that, *Rodriguez* court--if you take a look at their opinion,
2 they omit the word "so" from their definition of and quotation of
3 1030(e)(6), clearly indicating that the word "so," contrary to what
4 the government is trying to say, is not an important word in the
5 statute. The government says we were trying to, basically, ignore
6 that word; we're not. We stated in our motion, much like the *Nosal*
7 court stated, that that word can be a connector. Who--when the
8 government starts looking at "so" and asking this court to just use
9 the legislative history, they're the ones who are asking the Court to
10 read in a definition to the legislative history to the word "so" that
11 the legislative history does not support.

12 Most telling is that--and unfortunately for the government,
13 they don't have one case that cites the legislative history would
14 support them; not one case. There is not a case that indicates that
15 their interpretation of the legislative history is correct. We've
16 cited dozens of cases indicating that that's not the legislative
17 history. So, as Captain Morrow starts to say that the Ninth Circuit
18 is wrong and that his interpretation of legislative history is
19 correct, he doesn't have a case to back them up on that; it's his
20 opinion.

21 With regards to the cases--the 50/50 split that the Court
22 talks about--it's important to see which of those cases are criminal
23 and which are civil. Civil cases tend to be quick and short with

1 their interpretation of 1030 because there's not a person's life at
2 stake. It's usually a monetary issue and it almost becomes a
3 fairness issue. If you misappropriated another company's
4 intellectual property, courts usually kind of err on the side of
5 righting that wrong. But, when you look at the cases, other than
6 *John and Rodriguez*, that the government cites--and there are four of
7 them and I'll provide those four cases for the Court--it's the
8 *Continental* case, the *Salum* case, the *Registered* case, and *Czubinski*
9 case--these are the cases that the government wants you to say
10 support their interpretation; these are the four other cases other
11 than *John and Rodriguez*. None of these cases go into any legislative
12 history whatsoever. None of them cite the word "so" as being
13 important to their determination of what 1030 should apply. So, not
14 marking this as an exhibit, but just providing this to the Court as
15 far as case law for you to look at.

16 MJ: Thank you. What is the defense view--I'm--again, I'm going
17 back to the 1996 legislative history where they amended--Congress
18 amended section 1030(a)(1). And part of that says, "The amendment
19 specifically covers the conduct of a person who deliberately breaks
20 into a computer, without authority, or an insider who exceeds
21 authorized access and, thereby, obtains classified information and
22 then communicates the information to another person or retains it
23 without delivering it to the proper authorities?

1 CDC[MR.COOMBS]: Professor Orin Kerr--he talks about the correct
2 interpretation of 1030--goes into the legislative history. The cases
3 we cite in *Nosal*, contrary to what Captain Morrow says, does, in
4 fact, take a look--and a long look at the legislative history, much
5 more so than *John/Rodriguez* do. And when you look at that, what
6 they're talking about is the person who breaks into the computer or
7 the person who is the insider hacker who, as Orin Kerr talks about,
8 uses their initial access, then, to trick the computer into giving
9 them greater access to an area that they otherwise are not authorized
10 to go to or uses someone else's username and password in order to get
11 at information that they're not otherwise authorized to go to.
12 That's what 1030 is designed to--so it's--to protect against. So,
13 it's the unauthorized access person, the person who has absolutely no
14 access, the hacker, and then it's the inside hacker who, even though
15 they have authorization to access the computer, they extend their
16 authorized access by some way--a technical bypass way. Again, either
17 bypassing the otherwise protected restrictions or by using some
18 information that gives them greater access. So, in this case, if the
19 government's case--or evidence were that PFC Manning went to the Net-
20 Centric Diplomacy database and that database required a password and
21 he hacked his way past a password, then you would have an exceeds
22 authorized access. Or, if there was some information on the Net-
23 Centric Diplomacy database that he was authorized to go to, but other

1 information where he needed some additional authorization, a password
2 or otherwise, and he exploited a problem with the program in order to
3 trick the computer into giving him greater access, that would be
4 exceeding authorized access. But it's not the violating the terms of
5 use and that's the key thing. When you look at--even just from a
6 middle standpoint of thinking "authorized access," that's like the
7 trespass; that's the going someplace that you're not permitted to go.
8 The "use" in this instance--and that's what the government is really
9 alleging: improper use. They're saying that he had an improper
10 purpose when he accessed the information, not that he couldn't access
11 the information. So, in every regard, in fact, the evidence would
12 show that the Soldiers within the S-2 section were directed to go to
13 the Net-Centric Diplomacy database. So, it's not an issue of not
14 having the ability to go there, it's, "What was your intent when you
15 went there?" And that is a misappropriation or a violation of a term
16 of use, not exceeding your access issue.

17 MJ: I'm still having difficulty with the legislative history.
18 In other words, unlike existing espionage laws prohibiting the that
19 and peddling of government secrets to foreign agents, section
20 1030(a)(1) would require proof that the individual knowingly used a
21 computer without authority or in excess of authority for the purpose
22 of obtaining classified information. In this sense, then, is the use
23 of the computer which is being proscribed, not the unauthorized

1 possession of, access to, or control over the information, itself.
2 So, if it's the use of the computer that's being proscribed, I guess
3 I'm having a little trouble, now, following how use of the computer,
4 when you're using it for something the computer says you're not
5 supposed to use it for, doesn't fall within that paragraph of the
6 legislative history.

7 CDC[MR.COOMBS]: Yeah, and I think when you look at the *Nosal*
8 case and their--how they went through the legislative history, they
9 make it clear that what Congress is trying to prevent, here, is--it's
10 basically an anti-hacking--it's a trespass. So, the use, here--or
11 the access here is the going to an area that you don't have
12 authorization. So it's--that's the use of the access that statute is
13 addressing. Do you have authorization to go there? If so, then if
14 you, ultimately, do something improper with the information, there
15 may be another criminal offense you've committed, but it's the use of
16 the computer--in this case, the use of the computer being--"Do you
17 have the authorization from access standpoint?" So, even under the
18 government's theory of checking the box of "Okay" and the authorized
19 use--AUP signature that you signed off, it's not an issue of whether
20 he had authorized access to the information, it's an issue of did he
21 have an improper purpose when he accessed that information and that's
22 what 1030 has no applicability to.

23 MJ: Okay. Thank you.

1 CDC[MR.COOMBS]: Thank you, Your Honor.

2 MJ: All right. Are there any further issues that we--I'm

3 sorry, Captain Morrow, if you---

4 ATC[CPT MORROW]: Your Honor, the legislative history.

5 MJ: Thank you. All right. Why don't we go ahead and have the

6 legislative history marked as an appellate exhibit? All right, that

7 would be Appellate Exhibit 134. And, for the record, Mr. Coombs--

8 excuse me, I don't remember, did you cite the actual citations for

9 the cases that you gave me?

10 CDC[MR.COOMBS]: I did not, Your Honor, but what I can do is

11 I'll provide that information to the Court reporter.

12 MJ: Why don't we go ahead and do that rather than marking the

13 cases as an appellate exhibit?

14 CDC[MR.COOMBS]: Yes, Your Honor.

15 MJ: All right. Is there anything else that we need to address

16 at this time?

17 CDC[MR.COOMBS]: Nothing, Your Honor, from the defense.

18 MJ: we have a telephonic witness at 1600, is that correct?

19 CDC[MR.COOMBS]: That's correct, Your Honor.

20 TC[MAJ FEIN]: Yes, Your Honor.

21 MJ: All right, then, is there any reason we need to continue

22 the proceedings or should we recess and come back at 5 minutes to

23 1600?

1 CDC[MR.COOMBS]: I would go with the latter, Your Honor.

2 TC[MAJ FEIN]: Yes, Your Honor.

3 MJ: All right. Court is in recess.

4 **[The Article 39(a) session recessed at 1437, 7 June 2012.]**

5 **[The Article 39(a) session was called to order at 1606, 7 June 2012.]**

6 MJ: This Article 39(a) session is called to order. Let the
7 record reflect all parties present on the Court last recessed are
8 again present in court. Is the witness available via telephone?

9 TC[MAJ FEIN]: Yes, Your Honor.

10 CATHERINE BROWN, civilian, was called as a witness for the defense,
11 was sworn, and testified as follows:

12 **DIRECT EXAMINATION**

13 **Questions by the trial counsel:**

14 Q. Are you Ms. Catherine Brown, the current Deputy Assistant
15 Secretary of State for the Bureau of Intelligence and Research?

16 A. Yes, the Department of State, yes.

17 Q. Thank you. And, finally, as a reminder, if you feel any of
18 the answers for the questions you're asked requires a classified
19 answer, please immediately notify the Court.

20 MJ: And she was--excuse me, the Deputy Assistant Secretary of
21 State for?

22 TC[MAJ FEIN]: Your Honor, Ms. Brown is the Deputy Assistant
23 Secretary of State for the Bureau of Intelligence and Research.

1 MJ: Thank you.

2 [Examination of the witness continued.]

3 Q. Ms. Brown, did you hear that last part about the classified
4 information?

5 A. Yes.

6 Q. Okay. I'm now going to turn the microphone over to Mr.
7 Coombs, the defense attorney.

8 **Questions by the civilian defense counsel:**

9 Q. Mrs. Brown, my name is David Coombs. I'm going to ask you
10 a few questions, okay?

11 A. Okay. Is your last name K-O-O-N-Z?

12 Q. No, it sounds like that. It's Coombs: C-O-O-M-B-S.

13 A. Oh, okay. Thanks.

14 Q. Not a problem. When I ask you a question, if you don't
15 understand the question, feel free to let me know and I'll rephrase
16 it for you, okay?

17 A. Okay.

18 Q. And if there is anything that I ask you that you don't know
19 and you have to guess, just let me know that and will move on to
20 another question, all right?

21 A. All right.

22 Q. All right, Ms. Brown, could you tell the Court a little bit
23 about your background with the Department of State?

1 A. I joined the Department of State in August 1985 as a lawyer
2 in the legal advisor's office and I held mostly legal jobs, with two
3 exceptions, until August 2008 when I left the legal advisor's office
4 and became a Deputy Assistant Secretary for Intelligence Policy and
5 Coordination which is my current position.

6 Q. And, ma'am, could you tell the Court what you do in that
7 position?

8 A. My job, in a nutshell, is to work with the intelligence
9 community representing the interests of the Department of State to
10 ensure that intelligence activities support and are informed by
11 foreign policy.

12 Q. Now, in your role in that job, are you knowledgeable
13 regarding the Department of State reaction to the disclosure of
14 diplomatic cables?

15 A. Yes.

16 Q. And, in general, can you tell me how so?

17 A. You asked an open--you asked whether I'm familiar with the
18 department's attitude towards the disclosure of diplomatic cables,
19 generally.

20 Q. Now, just----

21 A. I mean, I would say that's--as a general matter, we don't
22 like it if they were classified.

1 Q. I understand, ma'am. Now, what I was asking was, regarding
2 the Department of State's reaction, as far as what it did when it
3 became aware of the fact that certain cables might be disclosed.

4 Q. You're speaking in the context of this prosecution? Yes, I
5 am.

6 Q. And, specifically, let's talk for a moment about the
7 Department of State's damage assessment. Are you familiar with the
8 Department of State's damage assessment?

9 A. Yes.

10 Q. And, based upon that familiarity, do you know the
11 Department of State has provided a copy of the damage assessment to
12 the Court and the parties?

13 A. Yes.

14 Q. Have you seen that document?

15 A. Yes.

16 Q. And I imagine, based upon being able to see it, you also
17 reviewed it?

18 A. Yes.

19 Q. And, from your standpoint--why were you reviewing the
20 document?

21 A. The document was compiled with input from our embassies and
22 consulates which came into the bureaus of the department and then the
23 bureaus prepared summary distillations of the input and their own

1 input and a person who reports to me who is the director of our
2 Office of Counter Intelligence and Consular Support was asked by
3 Undersecretary for Management Patrick Kennedy to take on the
4 responsibility for combining all those different reactions--summaries
5 into a single, consolidated document which I, then, ended up
6 reviewing and editing before asking that the drafts be provided to
7 the Undersecretary for his review before we did anything else with
8 it.

9 Q. And, ma'am, when you say you reviewed it and edited it,
10 what was your role in that process?

11 A. I received a draft that had a beginning, a middle, and an
12 end and I went through it from the very beginning to the very end,
13 editing it and asking that certain things be clarified and otherwise
14 doing a very careful review of it.

15 Q. And your--I guess the previous draft that you viewed, was
16 that document security anywhere?

17 A. Was it secured?

18 Q. Right. So, you reviewed the document and you made some
19 notations on it. Are the previous versions of the draft damage
20 assessment preserved in any manner?

21 A. I don't know. I mean, I was reviewing an electronic copy
22 and editing it as I went along. I don't know if it could be
23 recreated.

1 Q. This document that the Court has now is dated August 2011.

2 Is that the document that--the latest document that you reviewed?

3 A. Yes, the--well, it is the document that reflects the
4 changes and comments and questions and requests that I made with
5 respect to the document that I reviewed very carefully. So, it was--
6 I guess I would call it a draft that I had approved because it
7 reflected my review.

8 Q. Does this draft contain all the information collected
9 concerning the diplomatic cables, at least at the time of your
10 review?

11 A. I'm not sure I understand the question. It, obviously,
12 doesn't contain the cables, themselves, it contains--it's an effort
13 to pull together all of that input.

14 Q. Yeah, with regards to all the input surrounding the
15 disclosure of the cables, does the draft damage assessment that you
16 reviewed and finalized in August 2011 contain all the information
17 that the Department of State had with regards to the disclosure of
18 the cables?

19 A. It's my understanding from the people responsible for
20 preparing the draft for my review that they attempted, in that draft,
21 to reflect all of the input, insight, assessments of the various
22 bureaus of the department as of the time that it went forward to
23 Undersecretary Kennedy. Does that answer your question?

1 Q. It does, Ms. Brown.

2 A. Yes.

3 Q. Thank you. As far as--since August 2011, are you updating
4 this report?

5 A. No.

6 Q. So the content of the document has not changed in any way
7 since August 2011?

8 A. The document remains the draft as it was provided to the
9 Court.

10 Q. And, again, just on perfectly clear, that draft that was
11 provided to the Court was finalized in August of 2011 and no
12 additional content has been added?

13 A. Yes. I wouldn't use the word "finalize" because it was a
14 draft, but that is the draft as of August 2011 when it was provided
15 to the Undersecretary for Management for his review as a draft.

16 Q. Now, is there any plans to do an updated report?

17 A. I would have to defer to the undersecretary for that. I--
18 to the extent that the person I supervise was asked to prepare the
19 draft, he has not been asked to spend additional time updating it, to
20 my knowledge.

21 Q. And, based upon just your knowledge, do you know why no
22 additional effort has been done to update the damage assessment since
23 August 2011?

1 A. Well, one reason would be that it became evident very
2 quickly that the draft was out of date. I think it was provided, as
3 I recall, to the undersecretary very close to the time that there was
4 another very significant release by WikiLeaks of alleged State
5 Department cables and we were--I wouldn't say we were back to square
6 one, but we had a situation where we knew very quickly that a
7 substantial amount of additional time would, then, have to be devoted
8 to updating the draft and I think it was a question of whether that
9 would be a worthwhile use of people's time.

10 Q. All right. So--and to just develop a little bit of a
11 timeline--and you can correct me if I'm wrong--in August 2011 when
12 the report--this draft report was completed, the event that you're
13 talking about is the publication of the unredacted diplomatic cables
14 by WikiLeaks in September of 2011?

15 A. I'm--we--I, honestly, don't exactly remember the dates, but
16 it was around that time. No, I'm not in my office, so I--be hard
17 pressed to--but that makes--that sounds right to me.

18 Q. All right. And then----

19 A. I mean, I'm sure there's a--you know, that's one of those
20 questions there is an answer to it that can be discerned by reference
21 to objective facts, but, yeah.

22 Q. And with regards to--once that was done, whatever date that
23 might have been--of the unredacted cables being disclosed, then there

1 was, apparently, a determination that the updating of the draft
2 assessment would not be worth the time put into it?

3 A. I don't--I wouldn't say there was a determination made, I
4 would say it was--it's a long document, it takes a long time to work
5 through it. It took me weeks--several weeks to work through it. I
6 know the undersecretary told me, at one point, he was working his way
7 through it and, you know, he just never asked that we do anything.
8 Whether he may determination or whether it was just one of those
9 things that was overtaken by events, I don't know. The one thing I
10 do know is that we have never attempted to update the document.

11 Q. Do you know if it's been any effort to, at least,
12 supplement the document in any way based upon the fact that now the
13 unredacted purported diplomatic cables were online?

14 A. There has been no effort to supplement that document, if
15 you mean by writing an addendum or supplement to it. The only
16 additional work I'm aware of is that the drafter of the--the person
17 who was responsible for putting the draft together has attempted to
18 collect additional input and sticks it in a file. You know, if we
19 hear something that, "Oh, this terrible thing happened because of
20 something that was online that purported to be a State Department
21 document," he may make some notations or whatever so that he would
22 have access to that if you need to at some later time.

1 Q. All right. So, that would be a person who might be
2 tracking any sort of public statement with regards to potential
3 damage from the purported cables, is that correct?

4 A. I don't think he's tracking public statements, I think he's
5 trying to keep track of internal State Department assessments.

6 Q. All right. So----

7 A. If I were to send you a letter--if I were to send you
8 something tomorrow saying, you know, "My negotiations was just
9 totally screwed up because of this Wikileaks thing," and that were
10 something that he had access to, he might drop that in a little hold
11 folder, I think, but maybe an electronic--I don't even know what he's
12 doing, whether it's a list or what, but I have some sense he's trying
13 to stay current; let's put it that way. He's trying to stay current
14 on this in case he were asked to update it.

15 Q. All right. So, is this his own personal edification or is
16 this something that's a part of his job position?

17 A. Well, neither. I think it's just something since he is the
18 person in charge of putting it together, he's undertaking it on sort
19 of a voluntary basis.

20 Q. And could you give me his name, ma'am?

21 A. Can't we just leave it that he's the director of this
22 office?

1 A. I'll need to get a--his name, but if you feel uncomfortable
2 giving that in open court, would you feel comfortable providing that
3 to the trial counsel so that he can forward it to me?

4 A. I would feel comfortable in the lawyers getting together
5 and deciding what's appropriate at another time.

6 Q. That's fine. So, if I--if you could, ma'am, just check
7 into that with regards to the name and what I'd ask is that the
8 government counsel, at a later date, contact you in the not too
9 distant future to get that name from you, okay? Is that okay, ma'am?

10 A. You're--yeah--I mean, don't make the request to me, make it
11 to your--you know, through the prosecutor.

12 Q. I'll do that, ma'am.

13 A. Yeah.

14 Q. So, other than the draft damage assessment from August
15 2011, are you aware of any other damage assessment by any other
16 agency concerning the purported diplomatic cables?

17 A. Yeah.

18 Q. And what other agencies, ma'am.

19 A. I believe that the Office of the National
20 Counterintelligence Executive has prepared some kind of damage
21 assessment and it is possible that there is other work that has been
22 done by DoD or the Defense Intelligence Agency.

23 Q. Have you seen any of those other damage assessments?

1 MJ: I don't know if I've seen them or not. I don't--it's
2 conceivable they appeared in my inbox, but I don't recall, really,
3 paying any attention to them.

4 Q. And with regards to ONCIX, when were you aware of----

5 TC[MAJ FEIN]: Your Honor, objection. This is outside the scope
6 of what the defense asked this witness to testify to.

7 MJ: Why are we going into this?

8 CDC[MR.COOMBS]: Ma'am, I asked for witnesses about the
9 Department of State that I could talk to.

10 MJ: About the Department of State?

11 CDC[MR.COOMBS]: Correct, ma'am, regarding the diplomatic
12 cables. This is--goes to whatever other documentation might exist
13 regarding the diplomatic cables; that's why I'm asking this question.

14 TC[MAJ FEIN]: Your Honor----

15 MJ: I'll let you ask--yes, what is your objection?

16 TC[MAJ FEIN]: Well, Your Honor, the objection is within the
17 Department of State. The question is, now, leaving the four corners
18 of the building or the organization of the department, moving to
19 another executive branch--or another executive--the Court--that Ms.
20 Brown--first, limiting it to time to figure out and plus, hasn't even
21 been prepped on what is classified and what isn't, based off the
22 original scope.

1 MJ: Major Fein, that is--hasn't it already been established
2 that that other organization has a damage assessment?
3 TC[MAJ FEIN]: Absolutely, Your Honor, but----
4 MJ: Then why are we----
5 TC[MAJ FEIN]: ----at this point----
6 MJ: ----doing the----
7 TC[MAJ FEIN]: ----it wouldn't matter.
8 CDC[MR.COOMBS]: I want to find out when--if the witness knows
9 when she became aware of that. This goes back to due diligence
10 issues.
11 MJ: I'll let you ask that one question.
12 CDC[MR.COOMBS]: Thank you, ma'am.
13 [Examination of the witness continued.]
14 Q. Ms. Brown, with regards to ONCIX, when did you become aware
15 of the fact that they would have a damage assessment referencing the
16 disclosed diplomatic cables?
17 A. I became aware that they intended to do a damage assessment
18 sometime in early 2011, I would guess, but I am guessing.
19 Q. Okay, ma'am. Now, you indicated--you gave Ambassador
20 Patrick Kennedy's name, so I take it, obviously, you know Ambassador
21 Kennedy?
22 A. Yes.

1 Q. And did you know that Ambassador Kenney testified in front
2 of the Senate Committee on Homeland Security and Government Affairs
3 concerning the disclosed cables?

4 A. Yes, I'm--well, I was aware that he testified; I wouldn't
5 have remembered which committee it was.

6 Q. Are you aware if he testified in front of any other
7 committees?

8 A. I really don't--I just don't know what committee--I
9 would've been able to tell you which committee it was, I would have
10 just--I assume it would be a committee of jurisdiction over the State
11 Department, but I----

12 Q. Now, Ambassador Kennedy referenced something called "Chiefs
13 of Mission Review." He indicated that the State Department, once it
14 became aware of the potential release of diplomatic cables,
15 immediately asked the Chiefs of Mission at the affected posts to
16 review any of the purported state material. Is that something that
17 you're aware of?

18 A. I'm aware that he referenced having asked Chiefs of Mission
19 to review purported State Department documents that were thought to
20 be included in the release of Defense Department documents. I think
21 that's what he--you know, very early, was--I think that's what he was
22 referring to in his testimony.

1 Q. Now, from your standpoint of your experience, do you have
2 any experience with the Chief of Mission review?

3 A. The--are--you mean the one that was referred to by the
4 undersecretary in his testimony?

5 Q. Either that, ma'am--if that's the one you're familiar with--
6 -or are you familiar, at all, with the Chiefs of Missions review
7 regarding the purported state material that was release?

8 A. I think when--I'm having a little bit of difficult with
9 your use of "Chief of Mission review," but I think when
10 Undersecretary Kennedy testified, he was talking about having asked
11 certain embassies and consulates that had documentation allegedly in
12 this DoD release, to look at those documents and give him a sense of
13 the implications of that. There were--much later, for purposes of
14 the damage assessment, I was involved in a much larger number of
15 embassies who were asked to look at a much larger number of purported
16 State Department documents.

17 Q. All right. Let's talk about the issue that you were
18 involved with, then, the much larger review of the documents by the
19 Chiefs of Mission. When did that start?

20 A. I believe it would have started in early April of 2011.

21 Q. And what was the task or mission of the Chief of Mission
22 review?

1 A. Of--the one that was started in April 2011 was a request
2 for views from embassies, consulates feeding into bureaus that fed
3 into the damage assessment that--I mean, I've already--I think I,
4 earlier, referenced the fact that views were collected from around
5 the world and fed into bureaus which then compiled their perspective
6 and then the master document was created by the person in the--my
7 bureau who reports to me.

8 Q. All right. So, let's just go back just a little bit from
9 the actual damage assessment to the information that would have gone
10 into the damage assessment. The Chiefs of Mission review or their
11 request to look at certain cables from their particular embassy--am I
12 understanding this correctly that the cables that were purportedly
13 released from their particular embassy, they were asked to review and
14 comment on?

15 A. You lost me on the question. You mean in April of 2011?

16 Q. Correct. When you say there was a much larger Chiefs of
17 Mission review, I'd like to----

18 A. By April 2011, as I recall, a significant number of alleged
19 State Department documents had been posted by WikiLeaks are made
20 available to the press. We were talking well over 100,000 documents
21 and my recollection, without the benefit of being in my office, is
22 that, at that time, we were asking embassies and consulates to look
23 at those documents and the impact of those documents becoming public.

1 Q. And when you're asking the embassies and consulates to do
2 that, was it just the documents that were from their particular
3 embassy?

4 A. Actually, you know what? I think we may have also been
5 asking them to look at documents that might become public. I'm
6 actually a little vague right now because I'm not in my office. I
7 haven't had a chance to look at the actual instructions, but, yes,
8 embassies wouldn't have been--I think, as a general matter, people
9 would have looked at documents that originated with them--with their
10 posts. I mean, there might have been exceptions, but, you know, I'd
11 be speculating to think what the exceptions would be.

12 Q. So, with regards to the review done by the individual in
13 the embassy or consulate, did they send something to the Department
14 of State in writing regarding their review?

15 A. I would expect that they did. I didn't, personally, look
16 at what was sent in, whether it was cables or e-mails or sent in some
17 other way, but that was my sense, at the time, that some things--that
18 documents--responders were being sent in, one way or another, and
19 evaluated and compiled in the department.

20 Q. And so you, personally, never saw any of these evaluations?

21 A. No, I wouldn't say that. It's possible that I saw some--
22 that I read some--that somebody showed something to me at one point,

1 but I wasn't in charge of drafting this document, so I was not
2 attempting to make sure I saw everything that came in.

3 Q. Now, whatever did come in, would that be preserved in any
4 way within the Department of State?

5 A. Well, it would be an official communication so it should be
6 preserved unless it were coming in in some unusual and informal way.

7 Q. And the individual--I know you said you had kind of an
8 editing aspect to the damage assessment. Who was the person who
9 drafted the damage assessment? Was that the person that you didn't
10 want to provide the name?

11 A. That's the director of the Office of Counterintelligence
12 and Consular Support. He was the master assembler and drafter, but
13 the--you know, drafts were provided to him. I think if you look at
14 the report, you'll see that there are chapters on different regions
15 of the world or different functional issues and those chapters would
16 initially be drafted by the responsible bureau and given to the
17 person who reports to me and he would have put it into a master
18 document.

19 Q. And that person, as far as position, again, was the
20 Director of the Office of Counterintelligence---

21 A. And Consular Support.

22 Q. So, I guess if there were any of these assessments by the
23 Chiefs of Mission in writing, then that person, as he's the person

1 who is putting all of this together in one document, would, more than
2 likely, either have that information or know where it's at?

3 A. Well, he wouldn't be the official custodian of those
4 documents, no. These would be--if these came in as cables, they
5 would be--the official custodian would be the person who is a
6 custodian of our--you know, traffic--cable traffic.

7 Q. Okay. Do you know, after August of 2011, whether the
8 Chiefs of Mission conducted any additional reviews or any of the
9 embassies or consulates--of the cables?

10 A. Well, as I mentioned earlier, there was another significant
11 disclosure that occurred very soon after we sent the draft to the
12 undersecretary. So, presumably--some of those they may have already
13 worried about thinking this might become public, others, perhaps they
14 hadn't yet focused on, I don't know; but this problem hasn't gone
15 away. We could--today, you can imagine--today, something breaking in
16 the press or with a foreign government somewhere in the world and an
17 ambassador saying, you know, "My life, today, as ambassador, was
18 significantly hindered because of this WikiLeaks issue." So, I don't
19 think it's ever ended.

20 Q. And I guess that's what I'm asking: from September 2011
21 when all of the unredacted cables were available online, do you know
22 if any of the Chiefs of Mission or anyone else conducted any other
23 type of review or assessment?

1 A. I'm having trouble with your question because they seem
2 repetitive to me of what I've already answered.

3 Q. I apologize it's not my----

4 A. I'm sorry, I don't understand--are you asking me the same
5 question again, or are you trying to ask me a different question?

6 Q. I'm attempting to ask a different question. I apologize if
7 it sounds repetitive. What I am trying to understand is, if the
8 damage assessment was completed in August 2011 and, as you said, the
9 cables--another larger release was done immediately thereafter. And,
10 in fact, in September 2011, all the unredacted purported State
11 Department cables were online. So, then, I'm just wondering, from
12 your position, do you know if anything was done--now that all the
13 cables are out there--we're talking September 2011 to now, today,
14 June of 2012, was anything done to update or capture any of these
15 other possible impacts that you believe might be on-going?

16 A. Okay, to me, this is the same question I've already
17 answered, so let me go back to what I said before. There was that
18 huge disclosure, which you recalled as being in September of 2011?

19 Q. Correct.

20 A. Since that time, there has been occasional reporting from
21 our embassies and consulates about issues arising because of that
22 disclosure, because of all of the disclosures and my understanding is
23 that the director of our office--of Counterintelligence and Consular

1 Support is attempting to make some notation of that reporting in some
2 form so that, if the undersecretary were to say, "Could you update
3 this draft?" he would have some starting point for that. And I think
4 we will continue to see reporting about damage from WikiLeaks,
5 conceivably, for many years to come.

6 Q. Ma'am, and, again, I'm not trying----

7 A. And which means we could continue to get reporting for many
8 years to come.

9 Q. And not----

10 A. But I don't know--if you're asking, "Was there another
11 thing like in April of 2011, some new message that went out to Chiefs
12 of Missions saying, 'Okay, now give us yet another assessment,'" I
13 don't recall that there was.

14 Q. Okay. And what--just so you know, what I'm trying to
15 understand is whether the document that we have now that's been
16 provided is the latest assessment and I understand----

17 A. And I told you, yes, it is. There is no subsequent version
18 of that document. There is no alternative version of that document,
19 there is no addendum to that document, there is no supplement to that
20 document. All there would be would be additional reporting cables
21 have not been--sort of raw reporting was what we might call it; it
22 has not been compiled, distilled, put into any kind of summary form
23 that I am aware of.

1 Q. All right. So, the 2011 damage assessment identifies
2 persons at risk or what not--you're not aware of any update to
3 determine whether or not the department needed to do anything
4 different with regards to the persons at risk or anything?

5 A. No, I didn't say that. The persons at risk issue was a
6 separate issue.

7 Q. Are you aware of----

8 A. I mean, it's related.

9 Q. Okay, so----

10 A. I mean the persons at risk issue--if a cable was out there
11 with the names redacted, you might have had the embassy say, "If the
12 name stays redacted, this is the damage. If the name becomes public,
13 the damage gets worse." So, when the name became public, then you
14 would know that the damage would be worse, but let's say that named
15 person says, "You know, I want to stay where I am and see if I can
16 survive this," and so that's what he wants to do. And then, let's
17 say, 6 months later or a year later, he says, "Oh my goodness, now,
18 I'm finding that because my name was disclosed, all these bad things
19 are happening to me," then the person that risk's function is going
20 to kick in again, right? It's not like, all of a sudden, everybody's
21 life is hunky-dory. We will attempt to--it's my understanding that
22 we will attempt to protect people who were endangered by these
23 disclosures, regardless of whether they ask us to do that today or a

1 year ago or a year from now. That's different from the process of
2 writing that assessment which attempts to take a lot of different
3 reporting and pull it together into a single document.

4 Q. So, to your knowledge, ma'am, do you know if there have
5 been other reports addressing persons at risk since 2011?

6 A. I don't know. I was not--I was only tangentially involved
7 in the persons at risk group. I don't know that they did a report or
8 just handled things on an individual basis.

9 Q. So, from your position in your knowledge, other than the
10 damage assessment from 2011, are you aware of any other reports were
11 assessments from the Department of State regarding the diplomatic
12 cables?

13 A. Well, I mean, there are these persons at risk things, but I
14 don't know how they've been handled. I mean, I think they could
15 probably tell you how many people we've tried to resettle because of
16 the disclosures. They could probably--you know--would you call that
17 a report? I don't know, but I'm talking about this--that damage
18 assessment of trying to pull everything together and saying, "Here is
19 the damage."

20 Q. Understood, ma'am. So, if I understand you correctly,
21 then, other than the possibility of the persons at risk, you're
22 unaware of any other type of reports concerning the diplomatic cables
23 since August 2011?

1 A. Right, and I'm not saying that I'm aware of any that
2 persons at risk since 2011, I'm just saying they were two different
3 things, you know?

4 CDC[MR.COOMBS]: I understand. Well, ma'am, again, thank you
5 for your time. I understand that you were out of the office and you
6 were made available at kind of the last minute, so I appreciate you
7 being willing to answer questions. The prosecutor might have some
8 questions for you and the military judge may have some questions for
9 you.

10 MJ: Major Fein?

11 TC[MAJ FEIN]: Your Honor, the government has no questions for
12 Ms. Brown.

13 [The witness was excused and the connection was terminated.]

14 MJ: All right. Is there anything else that we need to address
15 today?

16 CDC[MR.COOMBS]: Ma'am, with regards to the motion to compel
17 discovery, I don't know, now, if we've had the ability to obtain the
18 information from the various Department of State representatives--
19 whether or not we need to address, now, the four subgroups within the
20 Department of State. If you look at Appellate Exhibit 97 at
21 Appellate Exhibit 100----

22 MJ: Hold on.

1 CDC[MR.COOMBS]: 97 will be the prosecution's response to the
2 Defense Motion to Compel Discover (2).

3 MJ: All right.

4 CDC[MR.COOMBS]: And if I could direct you, ma'am, to page 14 on
5 that and then Appellate Exhibit 100 will be the Prosecution's
6 Response to the Supplement to the Defense Motion to Compel Discovery
7 (2).

8 MJ: I don't have Appellate Exhibit 100, I have 101. Is it a
9 separate----

10 CDC[MR.COOMBS]: I'll ask the Court reporter if--I believe it's
11 100.

12 MJ: The exhibits I have in this package are 98, 99--ah, here it
13 is, 100.

14 CDC[MR.COOMBS]: So, if you look on that one, ma'am, it would be
15 page 5.

16 MJ: And what was--and page 14 on the other one?

17 CDC[MR.COOMBS]: Correct, ma'am. On page 14, if you go to the
18 last paragraph, it starts off, "The prosecution respectfully requests
19 the Court deny the defense request for any documents related to the
20 Chiefs of Mission, the WikiLeaks Working Group, the Mitigation Team,
21 and the Department of State's reporting to Congress in December of
22 2010 for failure to provide specificity or an adequate basis for its
23 request." Then, ma'am, if you go to page 5 on Appellate Exhibit 100,

1 it indicates that the defense made--and this is the--under
2 subparagraph d, on 10 May 2012, the defense made a specific request
3 for a specific entity under *Williams* for records from the Chiefs of
4 Mission, WikiLeaks Working Group, Mitigation Team, and Department of
5 State reporting to Congress. The prosecution agrees with the
6 defense. The prosecution wrote for this obligation, i.e. "files that
7 closely aligned entities under *Williams*. However, stated above, the
8 process is challenging and time-consuming and the prosecution
9 continues to work with the Department of State to search Department
10 of State records for *Brady* and R.C.M. 701(a)(6) material including
11 the four subgroups."

12 So, as far as the motion to compel discovery, it looks like
13 the latter opinion by the government is that this material is
14 discoverable and the Court--the defense would just like---

15 MJ: Well, they're just--it appears to be discoverable under
16 *Brady*.

17 CDC[MR.COOMBS]: Correct, ma'am. And so, for the motion to
18 compel discovery, we have two points, then: *Brady*--so then the
19 government's due diligence obligation to go look at these reports and
20 that's why we asked for information--or witnesses to come from the
21 Department of State. So, now, we know from Ms. Coffey that there are
22 minutes and agenda reports from the Mitigation Team. We know from
23 Ms. Bitter that there are situation reports that were put out bi-

1 weekly--we--by the WikiLeaks Working Group. That there--with regards
2 to the persons at risk, we know that there was some sort of
3 informational memorandum that was put out along with a matrix to
4 track the individuals, along with some formal guidance as to what
5 embassies, apparently, with persons at risk could and could not do or
6 what their response should be. We know from Ms. Brown, now, that,
7 apparently, this damage assessment we have that dates from 2011 is
8 the latest, but, apparently, there is an individual who is keeping
9 track of any possible impact since the 2011. It's unclear whether or
10 not that's a part of a department of state job duty title or personal
11 application, but that would be an example of a record that could,
12 potentially, contain *Brady*. So, for all of these, we would ask that
13 the government have a due diligence obligation to inspect these
14 records at the Department of State for 701(a)(6) purposes.

15 With regards to our argument under "closely aligned
16 agencies" falling under 701(a)(2), then, we'd rest on our brief and
17 our oral argument, but for that purpose, if the Court does agree that
18 the Department of State, due to its on-going relationship with DoD in
19 this issue and being closely aligned, its records should, in
20 fairness, be considered within the prosecutor's possession, custody,
21 and control and we would ask that the prosecutor has the added
22 obligation to review the records for material that's favorable to the
23 defense.

1 MJ: All right. Thank you. Major Fein, anything?

2 TC[MAJ FEIN]: Briefly, Your Honor. If it may please the Court,
3 may I brief from the table?

4 MJ: Yes.

5 TC[MAJ FEIN]: Your Honor, first and foremost, same as our
6 previous response to the motion to compel discovery, the Department
7 of State files are not within military authorities, therefore not
8 discoverable under 701(a)(2).

9 Your Honor, I'm going to move up; Ms. Williams can't hear
10 me.

11 Your Honor, the Department of State files are not
12 discoverable under 701(a)(2); they are not within the possession,
13 custody, and control of military authorities. We do, as the defense
14 pointed out, and we did in our written motion, we have determined
15 that we are closely aligned for *Williams* purposes with the Department
16 of State and these specific categories of documents, including others
17 that might exist, the prosecution will be searching for any *Brady*
18 material in those. Additionally, the government would argue that
19 aggravation evidence--or aggravation information that is not being
20 intended to be used in--for aggravation should not be included--or
21 would not be relevant and necessary since the defense, in their
22 brief, didn't say that there--in the alternative, 701(a)(2) are
23 asking for production under 703. And, in particular, the United

1 States argues that any information that would go towards--that would
2 be aggravating in nature that--again, just to repeat that the
3 government does not intend to use--would not be discoverable--either
4 relevant or necessary.

5 MJ: Let me stop you there. All of those items that the defense
6 just discussed, the minutes and agenda for the Mitigation team, the
7 situational reports bi-weekly, the persons at risk, the raw data on
8 impact, are there any witnesses the government is going to call from
9 the Department of State?

10 TC[MAJ FEIN]: Yes, Your Honor, but not necessarily on those
11 topics. So, what the government proposes, Your Honor, to clarify
12 this process is that, at a minimum, if the Court is inclined to rule
13 that 701(a)(2) does apply or doesn't apply and the is ruled that the
14 information should be relevant and necessary and be produced under
15 703, that, at a minimum, the documents be produced for the Court's
16 inspection under 703 after the prosecution has time to review them
17 and make that determination. As we've already stated on the record,
18 the prosecution hasn't even reviewed the documents to know if there
19 is *Brady* material or whether it's aggravating or not. But certain--
20 based off the testimony we've heard in court, today, from the three
21 witnesses--for instance, the Mitigation Team was stood up, Ms. Coffey
22 testified to--based on an OMB directive, to look at information
23 security, information assurance, and information management, we would

1 argue that's not even relevant at all to this court-martial. They
2 were looking at how to better improve their own systems which
3 wouldn't go to impact, it wouldn't go to damage, it wouldn't go to
4 any issue on the merits of whether Private First Class Manning did or
5 did not commit the charged offenses or whether he did or did not
6 cause harm on sentencing. So--and that's the first one, Your Honor.
7 So, that would be for the meeting agenda and minutes for the
8 Mitigation Team, so I do know that you asked whether we intended to
9 use that aggravation, but that wouldn't be aggravating, that wouldn't
10 be mitigating; it's completely irrelevant information, the
11 prosecution argues. It's also in the written brief.

12 As far as persons at risk, inherently in that title, we've
13 heard from the testimony from Ms. Bitter, was that that was for
14 individuals who were at risk that were harmed. So, unless the
15 government was using that information, we would argue it's not a
16 discoverable item. It definitely would not be *Brady* material and
17 wouldn't be discoverable under any other rule. But, until we see the
18 documents, we can't actually make that final decision and brief the
19 Court; it's just the general nature of that information.

20 MJ: Well, my findings may turn on what, if anything the
21 government uses----

22 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: ----from this and, as a general rule--I mean, just make
2 sure that the government understands this: if you turn over *Brady*
3 information from a file and it's not the complete file, that's not
4 going to be used in rebuttal or in Rule of Completeness if the
5 defense doesn't have it.

6 TC[MAJ FEIN]: Yes, Your Honor.

7 MJ: Okay. So, are you giving me a determination, at this
8 point, on whether or not the government is going to use any of this?

9 TC[MAJ FEIN]: No, Your Honor, the government is saying that, if
10 the Court is inclined to rule under 701(a)(2) for this material,
11 based off the written briefs and the oral argument just now, that, at
12 a minimum, the material will be produced--be reviewed by the
13 prosecution and then reviewed by the Court--produced to the Court
14 under 701(g)(2) or 505(g)(2), similar to 23 March order. That way,
15 the prosecution can make that determination, as we're getting the
16 documents, and then, in the filings, under 701(g)(2)--assuming that
17 we don't receive approval after we review it and just turn it over to
18 the defense--so, it would be documents we don't turn over to the
19 defense, based off the approvals--that we submit to the Court, at
20 that time, just like this last iteration. But the government is
21 making that argument at that time in our filings because we have to
22 see the information to do that.

1 MJ: So, to make--so, if I understand your ruling--or your
2 argument to me is if I make a ruling of--it's discoverable under
3 701(a)(2) or that it's relevant and necessary to be produced under
4 R.C.M. 701--703(e) or (f), then the government is requesting in
5 camera review----

6 TC[MAJ FEIN]: Yes, Your Honor.

7 MJ: ----to determine whether it is actually relevant and
8 necessary?

9 TC[MAJ FEIN]: Yes, Your Honor, the opportunity. The reason I
10 say the "opportunity," Your Honor, is that the prosecution could look
11 at it and say, "Yes, it is relevant and necessary. We agree with the
12 defense. Here you go." But it could be material that that would not
13 occur.

14 MJ: I guess I'm confused on timing, now. When does the
15 government--when would the government like me to make rulings on
16 these?

17 TC[MAJ FEIN]: The government--well, first, Your Honor, the
18 government argues that it's not relevant and necessary, nor does it
19 fall under military authorities for 701(a)(2). So, the governments
20 already working with the Department of State to review the material
21 for *Brady* so that's going to be happening as soon as--we've already
22 been told most of it's ready for us to start looking at, we're just
23 not doing it because we're here, now. So, once we're able to start

1 looking at it and then making the *Brady* determinations, we'll have a
2 better understanding of what information is there. So, we'd at least
3 ask for these categories--once we look at the information, then we'll
4 be better to present the information to the Court with a more concise
5 argument and be able to present to make the determination of whether
6 it's relevant and necessary for production to the defense.

7 MJ: So are you asking me to suspend my holding on this issue--
8 or my ruling on this issue until the next 39--Article 39(a) session?

9 TC[MAJ FEIN]: Can I have a moment, Your Honor?

10 MJ: Yes.

11 TC[MAJ FEIN]: Sorry, Your Honor, one more moment.

12 MJ: Why we do this: let's take a 10 minute recess. Is--do you
13 think that will be sufficient?

14 TC[MAJ FEIN]: Yes, ma'am.

15 MJ: Court is in recess.

16 **[The Article 39(a) session recessed at 1700, 7 June 2012.]**

17 **[The Article 39(a) session was called to order at 1719, 7 June 2012.]**

18 MJ: This Article 39(a) session is called to order. Let the
19 record reflect that all parties present on the Court last recessed
20 are again present in court government, what is your response?

21 TC[MAJ FEIN]: Your Honor, the United States asks for 30 days--
22 the Court to delay her ruling for 30 days which will give enough time
23 for the department to find those documents, especially because

1 multiple witnesses said the documents should exist--might exist to
2 find--in the categories that the defense has, now, said on the record
3 that they're requesting--find them, the government review them, and
4 be able to present to the Court whether--an argument whether they're
5 relevant or necessary, whether there is *Brady* information contained
6 within them, and the so on and so forth for that.

7 MJ: All right. That's 30 days from today, the 7th?

8 TC[MAJ FEIN]: Yes, Your Honor.

9 MJ: Any objection?

10 CDC[MR.COOMBS]: Well, Your Honor, obviously we want to get the
11 discovery, so if the government is indicating that that's the time
12 they need to do it, then, obviously, that's the time they need to do
13 it. So, we don't have any objection to them looking to obtain that
14 information, however, with regards to our requests for these four
15 subgroups, we've been making these requests for quite some time.
16 Obviously, today, just with the benefit of having the government, as
17 the Court requested, produce three witnesses, we now have additional
18 detail from within those subgroups, but the fact that we've been
19 asking for those groups has been something that has been on-going for
20 several months. So, the government really should have been looking
21 at this stuff a long time ago, but they're indicating they need an
22 additional 30 days, then, obviously, we want the discovery.

23 MJ: All right.

1 CDC[MR.COOMBS]: With regards to the----

2 MJ: Well, before we get there, Major Fein, I will give you the
3 additional 30 days. I would like the Court--or the government to
4 draft an order for me to approve that.

5 TC[MAJ FEIN]: Yes, Your Honor.

6 MJ: All right.

7 TC[MAJ FEIN]: I'll have that by tomorrow.

8 CDC[MR.COOMBS]: With regards to the four groups, now that we
9 have some additional information, the defense will, based upon
10 today's testimony, capture the additional information to give the
11 government even more specificity as to exactly what we're looking
12 for. But, it's important to note, this is just what we know under
13 701(a)(6)(3). Obviously, the government still has an obligation of
14 due diligence for *Brady* searching for closely aligned agencies under
15 (2) which, you know, the defense can only know what it knows. In
16 this case, we found out additional information, so we'll supplement
17 our request with additional information, but the government still
18 needs to be looking through the Department of State for *Brady*
19 information due to the fact that they're closely aligned.

20 With regards to one of the other categories that really
21 wasn't discussed today because none of the witnesses have detailed
22 knowledge--and that is the Congressional testimony by the Department
23 of State. We do know that Ambassador Kennedy testified in front of

1 the Senate committee, but we also know, based upon--even Ambassador
2 Kennedy's own statement at that hearing--that the Department of State
3 had testified on two previous occasions, at least, in front of
4 Congress. Those testimonies were--or at least the subject of that
5 testimony in front of Congress was not made public, however, the
6 defense would request--and more than likely there is in existence a
7 statement--a prepared statement by whoever went in front of Congress
8 to testify--that that document be produced if it contains *Brady*.
9 And, again, depending upon the Court's ruling with regards to
10 701(a)(2), if it's material to the preparation of the defense.

11 MJ: All right. And you're going to include that Congressional
12 piece in your supplemental motion, is that--or your supplemental
13 motion to compel?

14 CDC[MR.COOMBS]: Correct, ma'am. What we'll do is we'll just
15 call it an addendum to our Motion to Compel (2); just listing from
16 the witnesses the added detail that we found. And then, with regards
17 to the Congressional testimony, we do reference that in our motion to
18 compel, but I'll spell that out again.

19 MJ: Okay. Thank you. Yes, Major Fein?

20 TC[MAJ FEIN]: Your Honor, we'll include that in the draft
21 order.

22 MJ: All right. Thank you. Is anything else we need to address
23 today?

1 TC[MAJ FEIN]: No, Your Honor.

2 CDC[MR.COOMBS]: Nothing from the defense, Your Honor.

3 MJ: All right. As I've discussed with the parties, it's
4 preferable to the Court to start later tomorrow; there is a lot be
5 accomplished between now and then. So, we were going to begin the
6 proceedings at 11 o'clock in the morning as opposed to 0900. Is
7 there any objection to that from either side?

8 CDC[MR.COOMBS]: No, Your Honor.

9 TC[MAJ FEIN]: No, Your Honor.

10 MJ: All right. And, for the record, counsel and I have also
11 met in an R.C.M. 802 conference, briefly, to discuss just logistics
12 issues. As the parties are aware, the Court ruled earlier that, as
13 opposed to conducting R.C.M.--telephonic 802 conferences, the Court
14 will schedule interim Article 39(a) sessions in between the current
15 structure that we have and the parties and I have discussed that
16 issue and we have set the next Article 39(a) session for 25 June,
17 that's a Monday, at 1300 which is one o'clock in civilian parlance.
18 Anything else that either side desire is to add?

19 CDC[MR.COOMBS]: No, Your Honor.

20 TC[MAJ FEIN]: No, Your Honor.

21 MJ: All right. Anything else we need to address?

22 CDC[MR.COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, Your Honor.

1 MJ: Court is in recess.

2 [Article 39(a) session recessed at 1725, 7 June 2012.]

3 [END OF PAGE]

1 [The Article 39(a) session was called to order at 1115, 8 June 2012.]

2 MJ: This Article 39(a) session is called to order. Let the
3 record reflect all parties present on the Court last recessed are
4 again present in court. All right, the Court is prepared to rule on
5 the defense motion to dismiss Specifications 2, 3, 5, 7, 9, 10, 11,
6 and 15 of Charge II.

7 Before I do that, I would like to go over some scheduling
8 issues. The parties and I met briefly in an R.C.M. 802 conference--
9 as I described earlier on the record, PFC Manning, that's when I meet
10 with the lawyers to talk about logistics and scheduling issues in
11 cases--and we discussed the current trial calendar has us scheduled
12 to go to trial in October. Because we have some discovery issues
13 still remaining to resolve, the defense has requested additional time
14 to prepare their case after receiving all of the discovery. We are
15 meeting at the next Article 39(a) session on Monday, the 25th of June
16 at 1300 or one o'clock in the afternoon, civilian time. I've asked
17 the parties to propose draft calendars to come to the Court so we can
18 resolve, at that time, how we're going to proceed. The July session
19 that's currently scheduled will stay as is. The August session that
20 is currently scheduled will stay as is. What is in flux, now, is
21 what's going to happen after August. There will probably be a
22 similar September/early-October session based on the trial calendar,
23 2 weeks filing, 2 weeks to respond by the other side, and 5 days

1 reply and a week for the Court to consider everything that has been
2 filed and everything that's at issue for that particular session.
3 Now, what that's leaving us is the likelihood of a trial probably
4 taking place in either November or, depending on how the discovery
5 issues--how quickly we can get those resolved--it'll be either in
6 November or January. The parties and I discussed that it was
7 probably not a good idea to have a trial of this length in December
8 with all the holidays and that kind of thing going on because of the
9 issues of just breaking up the trial.

10 Do both sides agree with that synopsis?

11 CDC[MR.COOMBS]: The defense does, Your Honor.

12 TC[MAJ FEIN]: Yes, Your Honor.

13 MJ: And would either side like to add anything?

14 CDC[MR.COOMBS]: No, Your Honor.

15 TC[MAJ FEIN]: No, Your Honor.

16 MJ: Okay. All right. The defense moves this court to dismiss
17 Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II as
18 unconstitutionally vague in violation of the Fifth Amendment and
19 overbroad in violation of the First Amendment. Alternatively,
20 defense moves the Court provide limiting instructions. Government
21 opposes dismissal. The government joins defense and its request
22 provide instructions that define 18 United States code, Section

1 793(e). After considering the pleadings, evidence presented, and
2 argument of counsel, the Court finds and concludes as follows:

3 Factual findings: One, in Specifications 2, 3, 5, 7, 9,
4 10, 11, and 15 of Charge II, PFC Manning is charged with unauthorized
5 possession of disclosure of classified information in violation of
6 Section 793(e) and Article 134, United States--UCMJ, excuse me.

7 Two, 18 United States Code, Section 793(e) criminalizes
8 "whoever, having unauthorized possession of, access to, control over
9 any document, writing, code book, signal book, sketch, photograph,
10 photographic negative, blueprint, plan, map, model, instrument,
11 appliance, or note relating to the national defense, or information
12 relating to the national defense which information the possessor has
13 reason to believe could be used to the injury of the United States or
14 the advantage of any foreign nation, willfully communicates,
15 delivers, transmits, or causes to be communicated, delivered, or
16 transmitted or attempts to communicate, deliver, transmit, or cause
17 to be communicated, delivered, or transmitted the same to any person
18 not entitled to receive it, or willfully retains the same and fails
19 to deliver it to the officer or employee of the United States
20 entitled to receive it."

21 The law: void for vagueness. One, a motion to dismiss the
22 specification as being "void for vagueness" implicates the Due
23 Process Clause of the Fifth Amendment. To overcome a "void for

1 vagueness" challenge, a statute must be reasonably clear so as to
2 provide warning of the type of conduct which is proscribed and
3 provide standards sufficiently explicit prevent arbitrary and
4 capricious application. A statute is impermissibly vague if it,
5 "one, fails to provide people of ordinary intelligence a reasonable
6 opportunity to understand what conduct that prohibits; or, two,
7 authorizes or even encourages arbitrary and discriminatory
8 enforcement." *United States v. Shrader*, 2012 Westlaw 1111654, Fourth
9 Circuit, 4 April 2012, quoting *Hill v. Colorado*, 530 US 703 at 732,
10 2000; *United States v. Amazaki*, 67 MJ 666, Army Court of Criminal
11 Appeals, 2009. "The more important aspect of vagueness doctrine is
12 not actual notice, but the other principal element of the doctrine;
13 the requirement that a legislature establish minimal guidelines to
14 govern law enforcement." Courts also consider any judicial or
15 administrative limiting construction of a criminal statute in
16 determining whether it is unconstitutionally vague. *Kolender v.*
17 *Lawson*, 461 United States 352, 355, 357, 358, 1983.

18 Two, the person to whom a statute clearly applies has no
19 standing to challenge successfully the statute under which he was
20 charged for vagueness, *United States v. Morison*, 844 F.2d, 1057,
21 Fourth Circuit, 1988.

22 Three, a *mens rea* requirement mitigates a loss of
23 vagueness, especially with respect to actual notice of the conduct

1 proscribed. *United States v. Moyer*, 2012 Westlaw 639277, Third
2 Circuit, 2012 quoting *Gonzales v. Cartwright*, 550 US 124, 149, 2007.

3 The law: substantially overbroad. A statute is facially
4 overbroad when no set of circumstances exists when it could be valid,
5 *United States v. Salerno*, 481 US 739, 745, 1987.

6 Two, in the First Amendment context, a statute is
7 "overbroad" when a substantial number of its applications are
8 unconstitutional when compared with the statute's plainly legitimate
9 sweep. *United States v. Stevens*, 130 Supreme Court 1577, 2010.
10 First Amendment overbreadth challenges are an exception to the
11 general rule that an accused does not have standing to litigate the
12 rights of third parties. *United States v. Morison*, 844 F.2d 1057,
13 Fourth Circuit, 1988.

14 Analysis: void for vagueness--phrase "relating to the
15 national defense." One, the phrase "relating to the national
16 defense" is not defined in the statute. Defense argues the phrase is
17 unconstitutionally vague because it gives no fair warning of what
18 information comes within its sweeping scope.

19 Two, in *Gorin v. the United States*, 312 US 19, 1941, the
20 Supreme Court rejected a similar vagueness challenge to identical
21 language in the Espionage Act, the predecessor statute to the statute
22 at issue in this case. The Court held:

1 National defense, the government maintains, "is a
2 generic concept of broad connotations, referring to
3 the military and naval establishments and their
4 related activities of national preparedness." We
5 agree that the words "national defense" in the
6 Espionage Act carry that meaning. The language
7 employed appears sufficiently definite to apprise the
8 public of prohibited activities and is consonant with
9 due process. *Gorin*, at 28.

10 Three, post-*Gorin* federal courts have consistently found
11 that the phrase "relating to national defense" in 18 United States
12 Code, Section 793 is not unconstitutionally vague. See *United States*
13 *v. Morison*, 844 F.2d 1057, 1071 through 1074, Fourth Circuit, 1988;
14 *United States v. Kim*, 808 F. Supp. 2d 44, DDC, 2011; *United States v.*
15 *Rosen*, 445 F. Supp. 2d 602, 614 to 22, Eastern District of Virginia,
16 2006, affirmed on other grounds, 557 F.3d 192, Fourth Circuit, 2009.

17 Four, the Court agrees with the analysis of these cases and
18 finds the phrase "relating to the national defense" in 18 United
19 States Code 793(e) is not unconstitutionally vague

20 Analysis: void for vagueness--phrase "to the injury of the
21 United States or to the advantage of any foreign nation." One, 18
22 United States Code, Section 793(e) imposes an additional scienter
23 requirement for transmission of information requiring that the

1 accused "has reason to believe the national defense information could
2 be used to the injury of the United States or to the advantage of any
3 foreign nation."

4 Two, the Supreme Court rejected a vagueness challenge to
5 the predecessor statute on the basis of "the obvious delimiting words
6 in the statute" requiring that the defendants act with "intent or
7 reason to believe that the information can be obtained is to be used
8 to the injury of the United States to the advantage of any foreign
9 nation." *Gorin*, at 28-29. As a result, the Court found that there
10 was "no uncertainty in the statute which deprives a person of the
11 ability to pre-determine whether a contemplated action is criminal
12 under the provisions of law." *Id.* at 28.

13 Three, the statute requires the accused to have acted
14 "willfully." The scienter requirement that the statute imposes when
15 an accused is charged with transmitting "information relating to the
16 national defense" mitigates the law's vagueness, especially with
17 respect to actual notice of the conduct proscribed. See *United*
18 *States v. Ragen*, 314 US 513 at 524, 1942; *United States v. Kim*, 808
19 F. Supp. 2d 44, DDC, 2011; *United States v. Moyer*, 2012 Westlaw
20 639277, Third Circuit, 2012, quoting *Gonzales v. Cartwright*, 550 US
21 124 at 149, 2007.

22 Four, the Court agrees with the analysis of these cases and
23 finds the phrase "to the injury of the United States or to the

1 advantage of any foreign nation" in 18 United States Code, Section
2 793(e) is not constitutionally vague.

3 Five, for the reasons set forth above, the Court finds that
4 the combination of the phrases "relating to the national defense" and
5 "to the injury of United States or to the advantage of any foreign
6 nation" does not render the statute unconstitutionally vague.

7 Six, Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge
8 II or not unconstitutionally vague. Vagueness concerns can be
9 addressed with appropriate instructions. *United States v.*
10 *Squillacote*, 221 F.3d 542, Fourth Circuit, 2000.

11 Analysis: substantially overbroad in violation of the First
12 Amendment. One, defense argues that Section 793(e) is substantially
13 overbroad in violation of the First Amendment because it regulates a
14 substantial amount of protected speech and infringes on the freedom
15 of the press to investigate and publish articles on the national
16 defense topics.

17 Two, a similar overbreadth challenge was litigated in
18 *United States v. Morison*, 844 F.2d 1057, 1988. The *Morison* court
19 applied a three prong test to determine whether 18 United States code
20 793(e) was overbroad in violation of the First Amendment. One, is
21 the government interests sought to be implemented too insubstantial
22 or at least insufficient in relation to the inhibitory effects on
23 First Amendment Freedom? Two, do the means bear little relation to

1 the asserted government interest? And, three, if the means do relate
2 to a substantial government interest, can that interest be achieved
3 by a method less invasive of free speech rights? The Fourth circuit
4 held 18 United States Code, Section 793(e), one, expresses a vital
5 government interest in protecting national security; two, the statute
6 has a direct relation to the protection of the vital national
7 security interest; and, three, judicial instructions can narrow the
8 scope of the statute to ensure that the statute is narrowly tailored
9 to protect the vital national security interest.

10 Three, the Court agrees with the Fourth Circuit that 18
11 United States Code, Section ~~793~~(3) expresses a vital government
12 interest in protecting national security and that the statute has a
13 direct relation to the protection of the vital national security
14 interest.

15 Specifications 2, 3, 5, 7, 9, 10, 11, and 15 of Charge II
16 are not unconstitutionally overbroad in violation of the First
17 Amendment.

18 Conclusion: Specifications 2, 3, 5, 7, 9, 10, 11, and 15
19 of Charge II are not unconstitutionally vague nor substantially
20 overbroad. The Court will provide appropriate instructions to fully
21 inform the fact-finder of the elements of the offense and its
22 definitions. The parties are invited to provide the Court with
23 proposed instructions. The Court would greatly benefit from the

1 actual instructions used to define elements and definitions in
2 previous 18 United States Code 793 cases, to include *United States v.*
3 *Kim*, 808 F.2d 44, DDC, 2011; *United States v. Rosen*, 445 F.Supp. 2d
4 602, Eastern District of Virginia, 2006; *United States v.*
5 *Squillacote*, 221 F.3d 542, Fourth Circuit, 2000; *United States v.*
6 *Morison*, 844 F.2d 1057, Fourth Circuit, 1988; *United States v. Truong*
7 *Dinh Hung*, 629 F.2d 908, Fourth Circuit, 2000; and *United States v.*
8 *Dedeyan*, 584 F.2d 36, Fourth Circuit, 1978.

9 Ruling: The defense motion to dismiss Specifications 2, 3,
10 5, 7, 9, 10, 11, and 15 of Charge II is denied. The Court will draft
11 instruction similar to those approved by the Fourth Circuit and
12 invites the parties to submit proposed instructions for
13 consideration. Ordered this 8th day of June 2012.

14 Now, as scheduled before on the trial calendar, the
15 proposed instructions from the parties are scheduled to be in the
16 next round of motions and that will be addressed by the Court in the
17 July session. All right, the Court is going to need a recess of
18 approximately--say 20 minutes at this time. Is there anything we
19 need to address before we recess the Court?

20 CDC[MR.COOMBS]: No, Your Honor.

21 TC[MAJ FEIN]: No, Your Honor.

22 MJ: All right. Court is in recess; we will reconvene at 10
23 minutes to 12.

1 [The Article 39(a) session recessed at 1130, 8 June 2012.]

2 [The article 39 a session was called to order at 1208, 8 June 2012.]

3 MJ: This Article 39(a) session is called to order. Let the
4 record reflect all parties present when the Court last recessed are
5 again present in court. Before we begin, I received, last night, via
6 email, an addendum to the Defense Motion to Compel Discovery (2).
7 So, is that--I've noticed that that's been marked as a separate
8 appellate exhibit, 135?

9 CDC[MR.COOMBS]: It has, Your Honor.

10 MJ: Okay. Would you like to describe, for the record, what
11 that is?

12 CDC[MR.COOMBS]: Yes, Your Honor. Based upon yesterday's
13 testimony from the three Department of State witnesses, the defense
14 used that testimony in order to not only underscore the existence of
15 the various subgroups that the defense is trying to compel under
16 701(a)(6) and also 701(a)(2), but also the additional information
17 that was captured from each of these witnesses in order to give the
18 government further specific notice as to what the defense is
19 requesting. So, within this memorandum, we simply capture not only
20 the testimony what we learned, but also the government's obligations
21 under the discovery rules.

22 MJ: All right. And also--thank you. Also, last night--or this
23 morning, I received, pursuant to my request, an order from the

1 government granting a 30-day delay for looking at these records and
2 reporting back to the Court.

3 TC[MAJ FEIN]: Yes, Your Honor.

4 MJ: All right. Defense, have you seen that order?

5 CDC[MR.COOMBS]: I don't believe so, Your Honor, but it might
6 have been just--I haven't received it in my email.

7 MJ: Well, it's probably--you probably just got it because we
8 got it right before we came on the record. When we take a lunch
9 break, if you would, please review that and let's discuss after that
10 break if we have any objections to it.

11 CDC[MR.COOMBS]: Yes, Your Honor.

12 MJ: Okay. Now, my records for what we're going to litigate on
13 the 25th of June, at the next session, I have on the calendar the
14 Department of State 30 days--well, I guess that won't be done quite
15 yet on the --that will be litigated in the July session, is that
16 correct?

17 TC[MAJ FEIN]: Yes, Your Honor.

18 MJ: Okay. So, we have the trial calendar, the due diligence
19 request of the defense, and the supplemental briefs I've asked the
20 parties to prepare for the motion by the government that was filed to
21 conclude actual damage. Does either side have anything else that
22 they have jotted down that we're going to litigate on the 25th in the
23 ad hoc Article 39(a) session?

1 CDC[MR.COOMBS]: Nothing from the defense, Your Honor.

2 TC[MAJ FEIN]: No, Your Honor.

3 MJ: All right. The Court is prepared to rule on the Defense
4 Motion to Dismiss Specifications 13 and 14 of Charge II, Failure to
5 State an Offense.

6 The defense moves the Court to dismiss Specifications 13
7 and 14 of Charge II for failure state an offense because the
8 government has failed to allege the accused's conduct exceeded
9 unauthorized access within the meaning of 18 United States code,
10 Section 1030(a)(1). Government opposes. After considering the
11 pleadings, evidence presented, and argument of counsel, the Court
12 finds and concludes as follows:

13 One, Specifications 13 and 14 of Charge II charge PFC
14 Manning with violating 18 United States code, Section 1030(a)(1) and
15 Article 134, UCMJ.

16 Two, Specification 13 of Charge II alleges that the
17 accused: did, at or near Contingency Operating Station Hammer, Iraq,
18 between on or about 28 March 2010 and on or about 27 May 2010, having
19 knowingly exceeded authorized access on a Secret Internet Protocol
20 Router Network computer, and by means of such conduct having obtained
21 information that has been determined by the United States government,
22 pursuant to an executive order or statute to require protection
23 against unauthorized disclosure for reasons of national defense or

1 foreign relations, to wit: more than 75 classified United States
2 Department of State cables, willfully communicate, deliver, transmit,
3 or cause to be communicated, delivered, or transmitted the said
4 information, to a person not entitled to receive it, with reason to
5 believe that such information so obtained could be used to the injury
6 of the United States or to the advantage of any foreign nation, in
7 violation of 18 United States Code, Section 1030(a)(1), such conduct
8 being prejudicial to good order and discipline in the armed forces
9 and being of a nature to bring discredit upon the armed forces.

10 Three, Specification 14 of the same charge alleges that the
11 accused: did, at or near Contingency Operating Station Hammer, Iraq,
12 between on or about 15 February 2010 and on about 18 February 2010,
13 having knowingly exceeded authorized access on a Secret Internet
14 Protocol Router Network computer, and by a means of such conduct
15 having obtained what has been determined by the United States
16 government, pursuant to an executive order or statute to require
17 protection against unauthorized disclosure for reasons of national
18 defense or foreign relations, to wit: a classified Department of
19 State cable entitled "Reykjavik-13," willfully communicate, deliver,
20 transmit, or cause to be communicated, delivered, or transmitted the
21 said information to a person not entitled to receive it, with reason
22 to believe that such information so obtained could be used to the
23 injury of the United States, or to the advantage of any foreign

1 nation, in violation of 18 United States Code, section 1030(a)(1),
2 such conduct being prejudicial to good order and discipline in the
3 armed forces and being of a nature to bring discredit upon the armed
4 forces.

5 Three, Defense avers that the government theory at trial
6 will be either that, one, PFC Manning exceeded authorized access when
7 he allegedly accessed information for an improper person to give it
8 to someone not entitled to receive it, or, two, that PFC Manning
9 exceeded authorized access when he allegedly accessed, stored, and
10 disclosed information in contravention of the Army's Acceptable Use
11 Policy (AUP). The government asserted during oral argument that it
12 will be presenting evidence in addition to the AUP to prove that the
13 accused exceeded authorized access.

14 Four, during the Article 32 investigation, Special Agent
15 David Shaver from the U.S. Army Computer Crimes Investigative Unit
16 testified that he examined the two Secret Internet Protocol Router
17 Network (SIPRNET) computers used by the accused from approximately
18 October 2009 through May 2010, government enclosure 1, pages 125-7.
19 Special Agent Shaver testified when logging into both computers, the
20 user is presented with a warning banner. *Id.* at 134-5.

21 Five, the warning banner states as follows:

22 You are accessing a U.S. Government Information System
23 that is provided for U.S. Government use only. By

1 using this IS, which includes any device attached to
2 this IS, you consent to the following conditions: The
3 U.S. Government routinely intercepts and monitors
4 communications on this IS for purposes including, but
5 not limited to, penetration testing, COMSEC,
6 monitoring, network operations and defense, personnel
7 misconduct, law enforcement, and counterintelligence
8 investigations. At any time, the U.S. Government may
9 inspect and seize data stored on this IS.

10 Communications using, or data stored on, this IS are
11 not private, are subject to routine monitoring,
12 interception, and search, and may be disclosed or used
13 for any USG authorized purpose. This IS includes
14 security measures (e.g. authentication and access
15 controls) to prevent [sic] U.S. Government interests,
16 not for your personal benefit or privacy.

17 Notwithstanding the above, this IS does not constitute
18 consent to PM, LE, or CI investigative searching or
19 monitoring of the content of privileged communications
20 or work product related to personal representation or
21 services by attorneys, psychotherapists, or clergy, or
22 their assistants. Such communications and work
23 product are private and confidential.

1 See User Agreement or details. Government Enclosure 2.

2 Six, in January 2011, Special Agent Mark Mander from U.S.
3 Army Computer Crime Investigative Unit interviewed Captain Thomas
4 Cherepko from Headquarters and Headquarters Company, 2nd Brigade
5 Combat Team, 10th Mountain Division, who was the Assistant S-6
6 Officer during the time the accused was stationed in Iraq.
7 Government Enclosure 5, page 1. Captain Cherepko stated that a
8 signed user agreement for each user was required to access SIPRNET,
9 however, he could not locate a copy of the accused's signed user
10 agreement. *Id.*

11 Seven, Defense does not contest that Specifications 13 and
12 14 allege every element of the offense charged, 18 United States
13 Code, Section 1030(a)(1) and Article 134, UCMJ. Defense challenges
14 the theory underlying the specification as deficient. Such a
15 challenge has been styled as a "failure to state an offense" in
16 federal courts under Federal rule of Criminal Procedure 12 and where
17 the government theory is undisputed, the Court can address and
18 dismiss the charge prior to trial. See *United States v. Nosal*, 2012,
19 Westlaw 1176119, Ninth Circuit, 2012.

20 The law: failure to state an offense. One, the military as
21 a notice pleading jurisdiction. A charge and its specification is
22 sufficient if it, one, contains the elements of the offense charged
23 and fairly informs and accused of a charge against which he must

1 defend; and, two, enables the accused to plead an acquittal or
2 conviction in our of future prosecutions for the same offense. In
3 reviewing the adequacy of a specification, the analysis is limited to
4 the language as it appears in the specification, which must expressly
5 allege the elements of the offense or do so by necessary
6 implications. *United States v. King*, 71 MJ 50, footnote 2, Court of
7 Appeals for the Armed Forces, 2012, quoting *United States v. Fosler*,
8 70 MJ 225, 229, Court of Appeals for the Armed Forces, 2011 and
9 *United States v. Fleig*, 16 Court of Military Appeals 445, 447, 1966,
10 looking within the confines of the specification. A motion to
11 dismiss for failure to state an offense is a challenge to the
12 adequacy of a specification and whether the specification "alleges,
13 either expressly or by implication, ever element of the offense, so
14 as to give the accused notice and protection against double
15 jeopardy." *United States v. Amazaki*, 67 MJ 666, 669, 670, note 8,
16 Army Court of Criminal Appeals, quoting *United States v. Crafter*, 64
17 MJ 209, 211, Court of Appeals for the Armed Forces, 2006.

18 The law: the Computer Fraud and Abuse Act (CFAA), 18 United
19 States Code, Section 1030(a)(1). One, an accused violates the
20 Computer Fraud and Abuse Act when the accused knowingly accessed a
21 computer without authorization or exceeding authorized access, and by
22 means of such conduct having obtained information that has been
23 determined by the United States government, pursuant to an executive

1 order or statute, to require protection against unauthorized
2 disclosure for reasons of national defense or foreign relations, or
3 any restricted data, as defined in paragraph y of section 11 of the
4 Atomic Energy Act of 1954, with reason to believe that such
5 information so obtained could be used to the injury of the United
6 States, or to the advantage of any foreign nation, willfully
7 communicates, delivers, transmits, or causes to be communicated,
8 delivered, transmitted, or attempts to communicate, deliver, transmit
9 or cause to be communicated, delivered, or transmitted the same to
10 any person not entitled to receive it, or willfully retains the same
11 and fails to deliver to an officer or employee of the United States
12 entitled to receive it. 18 United States Code, Section 1030(a)(1),
13 emphasis added.

14 Two, 18 United States Code, Section 1030(e)(6) defines the
15 phrase "exceeds authorized access" as "to access a computer with
16 authorization and to use such access to obtain or alter information
17 in the computer that the accesser is not entitled so to obtain or
18 alter."

19 Analysis: statutory interpretation. The crux of the
20 defense motion is the interpretation of the "exceeds unauthorized
21 [sic] access" language in the CFAA. Defense argues that the
22 government failed to allege that he "exceeded authorized access"
23 within the meaning of the CFAA because he was authorized to access

1 the SIPRNET and entitled to access the classified information in
2 question. The government has alleged in the specification that the
3 accused "exceeded authorized access." The government further
4 alleges--avers that it will prove the accused "exceeded authorized
5 access" by the AUP and by other evidence.

6 Two, in *United States v. Starr*, 51 MJ 528, 532, Air Force
7 Court of Criminal Appeals, 1999, the Air Force Court of Criminal
8 Appeals provided a roadmap to resolving the legal meaning of a
9 statute. The Court said:

10 It is the function of the legislature to make the laws
11 and the duty of judges to interpret them. 2A Norman J. Slinger,
12 Sutherland Statutory Construction, Section 45.03, Fourth Edition,
13 1984. Judges should interpret a statute so as to carry out the will
14 of the legislature. *United States v. Dickerson* [sic], 20 CMR 154,
15 165, Court of Military Appeals, 1955. Otherwise, they violate the
16 principle of the separation of powers. Singer, *supra*, at 45.05. "If
17 the words used in the statute convey a clear and definite meaning, a
18 court has no right to look for or to impose a different meaning."
19 *Dickenson*, 20 CMR at 165. Thus, to interpret a statute, we employ
20 the following process: one, give the operative terms of the statute
21 their ordinary meaning; if the terms are unambiguous, the inquiry is
22 over; two, if the operative terms of the statute are ambiguous, then
23 we examine the purpose of the statute as well as the legislative

1 history; and, three, if reasonable ambiguity still exists, then we
2 apply the Rule of Lenity and resolve the ambiguity in favor of the
3 accused.

4 CFAA: ordinary meaning of the statute. As discussed in
5 further detail below, the term "exceeds authorized access" has been
6 subject to differing interpretations among the U.S. Circuit Courts of
7 Appeals, thereby indicating that the statutory language is not clear
8 and definite. Compare *Nosal III*, 2012 Westlaw 1176119 with *United*
9 *States v. John* 597 F.3d 263, Fifth Circuit, 2010, and *United States*
10 *v. Rodriguez*, 628 F.3d 1258, Eleventh Circuit, 2007. Therefore,
11 because the ordinary meaning of the operative language is ambiguous,
12 the Court must look to the purpose of the statute and the statutory
13 history. *Starr*, 51 MJ 532.

14 CFAA: legislative history. The CFAA was originally
15 enacted in 1984. Act of October 12, 1984, Public Law Number 98-473,
16 Sections 2101 through 2103, 98 Stat. 1837, 2190 to 92. In its
17 original versions, Section 1030(a)(1) punished anyone who "knowing
18 accesses a computer without authorization, or having accessed a
19 computer with authorization, uses the opportunity such access
20 provides for purposes to which such authorization does not extend,
21 and by means of such conduct obtained information that has been
22 determined by the United States government to require protection
23 against unauthorized disclosure for reasons of national defense or

1 foreign relations with the intent or reason to believe that such
2 information, so obtained, is to be used to the injury of the United
3 States or to the advantage of any foreign nation." Section 2102(a),
4 98 Stat. 2190, emphasis applied.

5 Two, 2 years later, in 1986, Congress replaced the terms
6 "or having accessed a computer with authorization, uses the
7 opportunity such access provides for purposes to which such
8 authorization does not extend" with the terms "or exceeds authorized
9 access." Computer Fraud and Abuse Act of 1986, Public Law Number 99-
10 474, section 2(c), 100 Stat. 1213. As the Senate report for the 1986
11 bill explained, "Section 2(c) substitutes the phrase 'exceeds
12 authorized access' for the more cumbersome phrase in the present 18
13 United States Code, Section 1030(a)(1) and (2), 'or having accessed a
14 computer with authorization, uses the opportunity such access
15 provides for purposes to which such authorization does not extend.'
16 The committee intends this changed assemble find a language in 18
17 United States Code, Section 1030(a)(1) and (2), and the phrase
18 'exceeds authorized access' is defined separately in Section 2(g) of
19 the bill." Senate Report Number 99-432, part 3, reprinted in 1986,
20 U.S.C.CAN, 2479, 2486.

21 Three, additionally, Congress added to Section 1030 the
22 definition of "exceeds authorized access" that is presently codified
23 at Section 1030(e)(6). However, in its attempt to simplify the

1 language, Congress changed the scope of the statute. Further, the
2 legislative purpose and history supports the plain meaning of the
3 statute. Congress enacted the CFAA to deter the "criminal element
4 from abusing computer technology in future frauds." HHR Rep. Number
5 98-894, at 4, 1984, reprinted in 1984, U.S.C.CAN 3689, 3690. As
6 originally enacted, the CFAA applied to a person who, one, knowingly
7 accessed without authorization or, two, "having accessed a computer
8 with authorization, uses the opportunity such access provides for
9 purposes to which such authorization does not extend." Public Law
10 Number 98-473, Section 2102, 98 Stat. 2190 through 91, 1984.
11 Congress amended the statute by replacing the latter means of access
12 with the phrase "exceeds authorized access." The stated reason for
13 the amendment was to simplify the language in 18 U.S.C. 1030(a)(1)
14 and (2).

15 Four, in 1996, Congress amended 18 United States Code,
16 Section 1030(a)(1) and clarified the differences between the CFAA and
17 federal espionage statutes. "Although there is considerable overlap
18 between 18 United States Code, Section 793(e) and 1030(a)(1), as
19 amended by the NII Protection Act, the two statutes would not reach
20 exactly the same conduct. 1030(a)(1) would target those persons who
21 deliberately break into a computer to obtain properly classified
22 government secrets then try to peddle those secrets to others,
23 including foreign governments. In other words, unlike existing

1 espionage laws prohibiting the theft and peddling of government
2 secrets to foreign agents, 1030(a)(1) would require proof that the
3 individual knowingly used a computer without authority, or in excess
4 of authority, for the purpose of obtaining classified information.
5 In this sense, then, it is the use of the computer that is being
6 proscribed, not the unauthorized possession of, access to, or control
7 over the classified information, itself." Senate Report Number 104-
8 357 at 6-6, 1996.

9 Five, therefore, an analysis of the legislative history of
10 the CFAA and the phrase "exceeds authorized access" reveals that the
11 statute is not meant to punish those who use a computer for an
12 improper purpose or in violating the government terms of use, but
13 rather the statute is designed to criminalize electronic trespassers
14 and computer hackers. See *International Association of Machinists &*
15 *Aerospace Workers*, 390 F.Supp. 2d at 495, quoting *Sherman & Company*
16 *v. Salton Maxim Housewares Inc.*, 94 F. Supp. 2d 817, 820, Eastern
17 District of Michigan, 2000.

18 CFAA: case law and conflicts among the federal circuits.
19 One, *Nosal III*, at 856, the appellant convinced his former co-workers
20 at his previous firm, Korn/Ferry, to help him establish a competing
21 business. The former co-workers used their Korn/Ferry login
22 credentials to download information from a confidential database.
23 They then pass this information to the appellant. The former co-

1 workers "were authorized to access the database, but Korn/Ferry had a
2 policy that forbade disclosing confidential information." The
3 defendant was charged with violating 18 United States Code, Section
4 1030(a)(4) for aiding and abetting the Korn/Ferry employees in
5 "exceeding their authorized access" with intent to defraud. The
6 appellant filed a motion to dismiss the CFAA charges, "arguing that
7 the statute targets only hackers, not individuals who access a
8 computer with authorization but then misuse information they obtain
9 by means of such access."

10 Two, the Court in *Nosal III*, at 857, agreed with the
11 appellant's argument and disagreed with the prosecution's attempt to
12 make the CFAA into "an expansive misappropriation statute" when it
13 was originally created as "an anti-hacking statute." To support its
14 conclusion, the *Nosal III* court cited the legislative purpose of the
15 CFAA. "Congress enacted the CFAA in 1984, primarily to address the
16 growing problem with computer hacking, recognizing that
17 "intentionally trespassing into someone else's computer files, the
18 offender obtains at the very least information as to how to break
19 into that computer system." Senate Report Number 99-432, at 9, 1986.

20 Three, the *Nosal III* court, in the end held the terms
21 "'exceed authorized access' in the CFAA, and as defined by 18 United
22 States Code, Section 1030(e)(6), does not extend to violation of use
23 restrictions." *Id.* at 863. *Nosal III* defines "exceeds unauthorized

1 access" to apply to inside hackers or individuals whose initial
2 access to a computer is authorized but who accesses unauthorized
3 information or files.

4 Four, the *Nosal III* court, at 862, also acknowledged that
5 its ruling differed from previous decisions made by other circuits,
6 namely, *United States v. John*, 597 F.3d 263, Fifth Circuit, 2010
7 ("Exceeds authorized access" occurred when the appellant violated her
8 employer's official policy by misusing the company's internal
9 computer when she properly accessed the computer system and customer
10 account information contained in it, but provided the information to
11 others who were able to incur fraudulent charges) and *United States*
12 *v. Rodriguez*, 628 F.3d 1258, Eleventh Circuit, 2007 ("Exceeds
13 authorized access" occurred when the appellant violated his agency's
14 policy of only obtaining information from its databases for official
15 reasons by properly accessing the agency's computer system, but
16 obtaining personal information from 17 different individuals for
17 personal reasons). However, the *Nosal III* court reasoned that its
18 sister circuits incorrectly looked at the culpable actions of the
19 appellants and did not consider the negative effects of expanding the
20 definition of "exceeds authorized access" to include "violations of
21 corporate computer use restrictions for violations of a duty of
22 loyalty."

Other decisions support the *Nosal III* court's narrow view of "exceeds authorized access." See *Orbit One Communications, Inc. v. Numerex Corp.*, 692 F.Supp.2d 373, 385, Southern District of New York, 2010; *United States v. Aleynikov*, 737 F.Supp.2d 173, 192, Southern District of New York, 2010; *Diamond Power International, Inc. v. Davidson*, 540 F.Supp.2d 1322, 1343, Northern District of Georgia, 2007; *Shamrock Foods v. Gast*, 535 F.Supp.2d 962, 965, District of Arizona, 2009; and *International Association of Machinists v. Aerospace Workers and Werner-Masuda*, 390 F.Supp.2d 479, 499, District of Maryland, 2005.

Rule of Lenity. When construing ambiguous criminal statutes, military courts have consistently applied the Rule of Lenity. See *United States v. Schelin*, 15 MJ 218, 220, CMA, 1983; *United States v. Cartwright*, 13 MJ 174, 176, note 4, CMA, 1982--Court of Military Appeals; *United States v. Inthavong*, 48 MJ 628, 630, Army Court of Criminal Appeals, 1998. "The Rule of Lenity, which is rooted in considerations of notice, requires courts to limit the reach of criminal statutes to reach--the clear import of their text and construe any ambiguity against the government." *United States v. Romm*, 455 F.3d 990, 1001, Ninth Circuit, 2006.

Two, when applying the Rule of Lenity in the CFAA context, the *Nosal III* court stated at 863:

1 If Congress wants to incorporate misappropriation
2 liability into the CFAA, it must speak more clearly. The Rule of
3 Lenity requires "penal laws to be construed strictly." *United States*
4 *v. Wiltberger*, 18 United States 76, 1820. "When choice has to be
5 made between two readings of what conduct Congress has made a crime,
6 it is appropriate, before we choose the harsher alternative, to
7 require that Congress should have spoken in language that is clear
8 and definite." *Jones v. United States*, 529 US 858, 2000. This
9 narrower interpretation is also a more sensible reading of the text
10 and the legislative history of a statute is general purpose is to
11 punish hacking, the circumvention of technological access barriers,
12 not misappropriation of trade secrets, a subject Congress has dealt
13 with elsewhere. Therefore, we hold that "exceeds authorized access"
14 in the CFAA is limited to violations of restrictions on access to
15 information, and not restrictions on its use.

16 Conclusions of law: failure to state an offense. One, the
17 language of Specifications 13 and 14 of Charge II includes all the
18 elements of the offense, fairly informs the accused to the charge
19 against which you must defend, and protects the accused against
20 double jeopardy. See *King*, at 51, footnote 2; *Fosler*, at 229; *Fleig*,
21 at 445.

22 Two, federal cases dismissing charges before evidence is
23 presented do so under Federal Rule of Criminal Procedure 12. This

1 court has the power to do the same under R.C.M. 907(b)(1). Whether
2 the Court should dismiss the specifications before presentation of
3 the evidence depends on whether the issue is capable of resolution
4 without trial on the issue of guilt. In this case, the government
5 stated in oral argument that it would present evidence in addition to
6 the AUP. The Court does not find that this issue is capable of
7 resolution prior to presentation of the evidence. The issue is
8 appropriately decided after presentation of the evidence, either as a
9 motion for a finding of not guilty under R.C.M. 917, or a motion for
10 a finding that the evidence is not legally sufficient. *King*, 71 MJ
11 50; *US v. Griffith*, 27 MJ 42, CMA, 1988.

12 Three, the language of the specifications state an offense.

13 Conclusions of law: CFAA. One, applying the Rule of
14 Lenity, the Court shall adopt the narrow meaning of "exceeds
15 authorized access" under the CFAA and instruct the fact-finder that
16 the term "exceeds authorized access" is limited to violations of
17 restrictions on access to information, not restrictions on its "use."
18 The Court shall craft instructions for defining "exceeding authorized
19 access" in Specifications 13 and 14 of Charge II using the language
20 and the legislative history in 1996.

21 Two, should the government not prove an element as alleged
22 in the specifications in accordance with the instructions given in
23 accordance with the narrow view of *Nosal III* at the close of the

1 evidence, the Court shall entertain motions under R.C.M. 917 or for a
2 finding that the evidence is not legally sufficient to sustain a
3 guilty finding.

4 Ruling: the Defense Motion to Dismiss Specification 13 and
5 14 of Charge II for Failure to State an Offense is denied. So
6 ordered this 8th day of June 2012.

7 Is anything else we need to address with respect to this
8 issue?

9 TC[MAJ FEIN]: No, Your Honor.

10 CDC[MR.COOMBS]: No, Your Honor.

11 MJ: All right. And, again, the instructions are scheduled for
12 the next session. Please prepare the 1030(a)(1) instructions in
13 accordance with this rule.

14 TC[MAJ FEIN]: Yes, Your Honor.

15 CDC[MR.COOMBS]: Yes, Your Honor.

16 MJ: Okay. All right. Is this a good time to take a lunch
17 break?

18 CDC[MR.COOMBS]: Yes, Your Honor.

19 TC[MAJ FEIN]: Yes, Your Honor.

20 MJ: Okay. Are the parties going to require some significant
21 time to--well, first of all, Government, when are you going to get me
22 the information I need to make a discovery ruling?

1 TC[MAJ FEIN]: Your Honor, we'll give you an update in the next
2 10 minutes after we go on recess.

3 MJ: All right. Why we do this--what is--it's 1230----

4 TC[MAJ FEIN]: Update on the status, Your Honor.

5 MJ: Okay. If we come back on the record at 1500, is that going
6 to present any problems for anyone?

7 TC[MAJ FEIN]: No, Your Honor.

8 CDC[MR.COOMBS]: No, Your Honor. That'll be fine. I can bump
9 the flight, Your Honor.

10 MJ: What time is it?

11 CDC[MR.COOMBS]: It's at 1800, Your Honor.

12 MJ: Let's try 1430; that work for you?

13 CDC[MR.COOMBS]: Yes, Your Honor. Thank you.

14 MJ: Court is in recess.

15 **[The Article 39(a) session recessed at 1237, 8 June 2012.]**

16 **[The Article 39(a) session was called to order at 1445, 8 June 2012.]**

17 MJ: This Article 39(a) session is called to order. Let the
18 record reflect all parties present on the Court last recessed are
19 again present in court. For the record, counsel and I met for an
20 R.C.M. 802 conference, briefly, where the defense advised me of an
21 issue that they intend to raise in July for the session. Would you
22 like to describe that for the record?

1 CDC[MR.COOMBS]: Yes, Your Honor. Consistent with the Court's
2 ruling in Appellate Exhibit 139 regarding the 1030 specifications,
3 the Court indicated that, with regards to these specifications, it
4 would not dismiss these because, at this point, it believed, based
5 upon what the government stated in oral argument, it was not an issue
6 that was capable of being resolved without a trial on the issue of
7 guilt. The defense believes that the government's additional
8 evidence is still a use-based restriction and, therefore, consistent
9 with the Court's ruling, this would not be a basis for a 1030
10 offense. And, therefore, once we flush out what the government's
11 actual evidence is, we would see that this would, in fact, qualify as
12 an issue that is capable of being resolved out of trial on the
13 merits. The defense intends to file a motion on 22 June for 16
14 through 20 July Article 39(a) in order to address this issue more
15 fully into, again, seek the dismissal of Specifications 13 and 14 of
16 Charge II.

17 MJ: All right, build it into the trial calendar. Just--as
18 you're going forward with this motion, just understand, in my ruling,
19 there can be--and this is why I ruled the way I did--that I think
20 this is going to be more--this is going to be appropriate for
21 resolution after the evidence comes in because I don't necessarily
22 see use and access as mutually exclusive and that's where I'm looking

1 at in my ruling. So, just bear that in mind when you make these
2 motions.

3 CDC[MR.COOMBS]: Yes, Your Honor, we'll keep with the
4 legislative history of 1996 as well as the narrow view from *Nosal*
5 *III*.

6 MJ: Yeah, and--yes. And that is what I ruled and that is how--
7 when you prepare the instructions, look at the legislative history
8 and the narrow view and I'll guess we'll see what we see with the
9 motion.

10 CDC[MR.COOMBS]: Thank you, Your Honor.

11 MJ: Government, anything?

12 ATC[CPT MORROW]: Nothing, Your Honor.

13 MJ: All right. Well, first--before I rule on the lesser
14 included offense issue, the--has the defense had an opportunity to
15 review the proposed order for delaying the discovery--the Department
16 of State information?

17 CDC[MR.COOMBS]: We have, Your Honor.

18 MJ: Do you have any objection to it?

19 CDC[MR.COOMBS]: No, Your Honor.

20 MJ: And, Defense, are you confident that--the government's
21 factual findings establish a litany of documents. I assume--does
22 this encompass everything that you had in your addendum?

1 CDC[MR.COOMBS]: Yes, Your Honor, and then, obviously, in
2 addition to that, just their general requirements under 701(a)(6).

3 MJ: Okay. Yes, Major Fein?

4 TC[MAJ FEIN]: I was just affirming that.

5 MJ: Okay. In that case, I will go ahead and sign it and we'll
6 mark it as the next appellate exhibit in line. All right, that'll be
7 Appellate Exhibit 142. All right, the Court is prepared to rule on
8 the defense and government motions for instructions on lesser
9 included offenses.

10 Defense and government move the Court for instructions on
11 lesser included offenses (LIO). Each party opposes the other's
12 motion, at least in part. After considering the pleadings, evidence
13 presented, and argument of counsel, the Court finds and concludes as
14 follows:

15 Factual findings: one, the accused is charged with five
16 specifications of violating a lawful regulation, one specification of
17 aiding the enemy, one specification of conduct prejudicial to good
18 order and discipline and service discrediting, eight specifications
19 of communicating classified information, five specifications of
20 stealing or knowingly converting government property, and two
21 specifications of knowingly exceeding authorized access to a
22 government computer in violation of Articles 92, 104, and 134, UCMJ,
23 and 10 United States Code, Sections 892, 904, and 934.

1 Specifically in Specifications 2, 3, 5, 7, 9, 10, 11, and
2 15 of Charge II, the accused is charged with unauthorized possession
3 and disclosure of information relating to the national defense in
4 violation of 18 United States Code, Section 793(e). In
5 Specifications 13 and 14 of Charge II, the accused is charged with
6 knowingly exceeding authorized access to a government computer in
7 violation of 18 United States Code, Section 1030(a)(1).
8 Specification 1 of Charge II charges PFC Manning with wrongfully and
9 wantonly causing United States intelligence to be published on the
10 Internet, having knowledge that the intelligence placed on the
11 Internet is accessible to the enemy, in violation of Article 134.
12 Finally, Specifications 4, 6, 8, 12, and 16 of Charge II allege that
13 the accused stole, purloined, or knowingly converted to his use or
14 the use of another a thing of value owned by the United States
15 government, with a value over \$1,000, in violation of 18 United
16 States Code, Section 641. In addition, each of these specifications
17 allege that the conduct described therein is prejudicial to good
18 order and discipline in the armed forces and is of a nature to bring
19 discredit upon the armed forces, in violation of Article 134.
20 Three at the relevant time, Army Regulation 380-5,
21 Department of the Army Information Security Program, was in effect.
22 The regulation is a punitive, lawful general order pursuant to
23 paragraph 1-21.

1 Four, as charged, the elements of Specification 1 of Charge
2 II are, one that the accused wrongfully and wantonly caused to be
3 published on the Internet, intelligence belonging to the United
4 States government, having knowledge that intelligence published on
5 the Internet is available to the enemy, and, two, was of a nature to
6 bring discredit upon the armed forces.

7 As charged, the elements of Specifications 2, 3, 5, 7, 9,
8 11, and 15 of Charge II, which alleges a violation of 18 United
9 States Code, Section 793(e), are, one, that the accused had
10 unauthorized possession of certain specified information; two, that
11 the specified information related to the national defense; three,
12 that the accused had reason to believe the information in question
13 could be used to the injury of the United States or to the advantage
14 of any foreign nation; four, that the accused willfully communicated,
15 delivered, transmitted, or caused to be communicated, delivered, or
16 transmitted, the information to any person not entitled to receive
17 it; and, five, that such conduct was prejudicial to good order and
18 discipline in the armed forces and of a nature to bring discredit
19 upon the armed forces.

20 Six, as charged, the elements of Specifications 13 and 14
21 of Charge II, which alleges a violation of 18 United States Code,
22 Section 1030(a)(1) are, one, that the accused knowingly accessed a
23 computer exceeding authorized access; two, by means determined by the

1 United States government by executive order or statute to require
2 protection against unauthorized disclosure for reasons of national
3 defense or foreign relations; three, that the accused had reason to
4 believe the information obtained could be used to the injury of
5 United States or to the advantage of any foreign nation; four, that
6 the accused willfully communicated, delivered, transmitted, or caused
7 to be communicated, delivered, or transmitted, the information to any
8 person not entitled to receive the information; and, five, that such
9 conduct was prejudicial to good order and discipline in the armed
10 forces and other nature to bring discredit upon the armed forces.

11 Seven, as charged, the elements of Specifications 4, 6, 8,
12 12, and 16 of Charge II, which alleges a violation of 18 United
13 States Code, Section 641 are, one, that the records described in the
14 specification belonged to the United States government; two, that the
15 records had a value in excess of \$1,000 at the time alleged; three,
16 that the accused did steal, purloin, or knowingly convert such
17 records to his use or the use of another; four, that the accused did
18 so knowing the property was not his and with intent to deprive the
19 government of its use or benefit, either temporarily or permanently;
20 and, five, that such conduct was prejudicial to good order and
21 discipline in the armed forces and of a nature to bring discredit
22 upon the armed forces.

1 Eight, the elements of a violation of Article 92, UCMJ are-
2 -Article 92(1), UCMJ, are, one, that a certain lawful general order
3 or regulation was in effect; two, that the accused ad a duty to obey
4 that order or regulation; and, three, that the accused failed to obey
5 the order or regulation.

6 Nine, the defense requests all LIOs that the defense agrees
7 are LIO.

8 LIOs the parties agree upon:

9 One, Specifications 2 through 16 of Charge II: Attempt.
10 The parties agree that attempt can be a lesser included offense of
11 all of the offenses if raised by the evidence.

12 Two, Specifications 4, 6, 8, 12, and 16 of Charge II: 18
13 United States Code, Section 641, property of a value of less than
14 \$1,000. The parties agree that this is an LIO.

15 And, three, Specifications 13 and 14 of Charge II: 18
16 United States Code, Section 1030(a)(1), Clause 1 and 2 of Article
17 134, UCMJ. The parties agree that this is an LIO.

18 LIOs in dispute. One, Specifications 2, 3, 5, 7, 9, 11,
19 and 15 of Charge II: 18 United States Code, Section 793(e), Article
20 92(1), UCMJ, violation of Army Regulation 380-5, defense requests,
21 government opposes on the ground that the elements of Article 92(1),
22 UCMJ are not a subset of 18 US Code, Section 793(e).

1 Two, Specifications 2, 3, 5, 7, 9, 11, and 15 of Charge II:
2 18 United States Code, Section 793(e), Clauses 1 and 2 Article 134,
3 UCMJ, the government requests, the defense opposes on the grounds the
4 clause 1 and 2 violation must be charged as a violation of a lawful
5 general order.

6 Three, Specification 1 of Charge II: Article 134, Clauses
7 1 and 2, Article 92(1), UCMJ, violation of Army Regulation 380-5,
8 defense requests, the government opposes on the ground that the
9 elements of Article 92(1), UCMJ, are not a subset of the elements of
10 Article 134.

11 Four, Specifications 4, 6, 8, 12, and 16: 18 United States
12 Code, Section 641, Clauses 1 and 2 of Article 134, UCMJ, government
13 requests, defense opposes based on preemption by Article 121, UCMJ.

14 The law. One, the proper test for determining whether one
15 offense constitutes a lesser included offense of another is the
16 "elements test" from *Schmuck v. the United States*, 489 US 705, 716,
17 717, 1989. *United States v. Jones*, 68 MJ 465, 469 to 70, Court of
18 Appeals for the Armed Forces, 2010. Under the elements test, "one
19 offense not necessarily included in another unless the elements of
20 the lesser offense are a subset of the elements of the charged
21 offense. Where the lesser offense requires an element not required
22 for the greater offense, no instruction is to be given." *Jones*, 68
23 MJ at 469 to 70, quoting *Schmuck*, 489 US at 716. The Court must look

1 to Congressional enactments to ascertain the elements of an offense.
2 *Id* at 471.

3 Two, "the elements test does not require that the two
4 offenses at issue employ identical statutory language. Instead,
5 after applying the normal principles of statutory instruction, the
6 Court asks whether the elements of the alleged lesser included
7 offense are a subset of the elements for the charged offense."
8 *United States v. Bonner*, 70 MJ 1, 2, Court of Appeals for the Armed
9 Forces, 2011. "The fact that there may be an alternative means of
10 satisfying an element in a lesser offense does not preclude it from
11 being a lesser included offense." *United States v. Arriaga*, 70 MJ
12 51, 55, Court of Appeals for the Armed Forces, 2011. The charged
13 language in the specifications determines which statutory variables
14 are relevant for purposes of a lesser included offense analysis. *Id.*
15 at 55. "The comparison is drawn between offenses. Since offenses
16 are statutorily defined, that comparison is appropriately conducted
17 by reference to statutory elements of the offenses in question and
18 not, as the inherent relationship approach would mandate, by
19 reference to conduct prove the trial regardless of the statutory
20 elements of the offenses in question. One element of an offense is
21 not 'necessarily included' in another unless the elements of the
22 lesser offense are a subset of the elements of the charged offense."

1 *United States v. Medina*, 66 MJ 21, Court of Appeals for the Armed
2 Forces, 2008.

3 Three, regarding Article 134, UCMJ, the Manual for Courts-
4 Martial directs that the elements of an assimilated crime or offence
5 not capital of the elements as defined in the applicable law. MCM,
6 part IV, paragraph 60(b). If the conduct in question is to be
7 punished under clauses one or two of Article 134, UCMJ, the elements
8 are twofold: one, the specific actions the accused did or failed to
9 do, and, two, that the accused acts or omissions were prejudicial to
10 good order and discipline or of a nature to bring discredit upon the
11 armed forces. Clauses 1, 2, and 3 are alternative theories of
12 prosecution under Article 134. Clauses 1 and 2 are lesser included
13 offenses of clause 3, if the elements of clauses 1 and 2 are pled in
14 the specification. *United States v. Medina*, 66 MJ 21, Court of
15 Appeals for the Armed Forces, 2008.

16 Analysis. Specifications 2, 3, 5, 7, 9, 11, and 15 of
17 Charge II, 18 United States Code, Section 793(e), Article 92(1),
18 UCMJ, violation of Army regulation 380-5:

19 One, The crime or offense not capital that the government
20 assimilated via Clause 3 of Article 134 in Specifications 2, 3, 5, 7,
21 9, 10, 11, and 15 of Charge II, 18 United States Code, Section
22 793(e), is a generally applicable, federal criminal statute that is
23 part of the criminal sanctions Congress crafted for espionage. As

1 such, it is not founded upon the existence of a regulation of any of
2 the military services, and Congress did not include a reference to
3 such authority in establishing the offense found at 18 United States
4 Code, Section 793(e). It is enough that the accused's possession of
5 the specified information was "unauthorized;" the statute does not
6 require more.

7 Two, while a lawful general regulation, such as the one at
8 issue in this case, can serve as the basis for an accused's
9 possession of certain information being unauthorized, the plain
10 language of the statute does not require the existence of such a
11 regulation in order to commit the offense. It is simply irrelevant
12 under the statute what source of the accused's lack of authority for
13 possessing the information was so long as the accused was without
14 authority. Therefore, it follows that the existence of a lawful
15 general regulation is not necessarily included in a violation of 18
16 United States Code, Section 793(e).

17 Three, the fact that the regulation in this case can serve
18 as a basis for the lack of authority required in Section 793(e) does
19 not alter the analysis. The specifications in question do not add
20 anything to the statute that would import a requirement for a lawful
21 general regulation into the offense; indeed, they are not permitted
22 to do so for purposes of defining an offense. MCM, part IV,
23 paragraph 60(b); see *United States v. Jones*, 68 MJ at 471. The

1 statute also does not include a variable that specifications could
2 further refine consistent with *Arriaga*. Instead, Section 793(e)
3 specifies the exact conduct required constitute an offense and the
4 conduct does not include a failure to obey a lawful general
5 regulation, even though violating a germane lawful general regulation
6 would potentially result in the commission of an offense under
7 Section 793(e). To hold otherwise would be to return to the inherent
8 relationship test that the CAAF reject--Court of Appeals for the
9 Armed Forces rejected in *Jones*. The second element of the proposed
10 LIO, Article 92(1), the accused had a duty to obey the lawful general
11 regulation is not a lesser included element of Clauses 1 and 2 of
12 Article 134. Prejudice to good order and discipline and service
13 discrediting conduct does not require that the accused had a duty to
14 obey a lawful general regulation. Based on the elements as charged,
15 it is not impossible to prove 18 United States Code, Section 793(e)
16 without also proving a violation of a lawful general order. So, the
17 defense request for an instruction to the effect that a violation of
18 Article 92, UCMJ, is a lesser included offense of Specifications 2,
19 3, 5, and 7, 9, 10, 11, and 15 of Charge II is denied.

20 Specification 1 of Charge II: Clause 1 and 2 of Charge II,
21 Article 134, UCMJ. Similarly, an Article 92 offenses is not a lesser
22 included offense of the Article 134 offense described in
23 Specification 1 of Charge II. The actions alleged in Specification 1

1 of Charge II do not include a failure to obey a lawful general
2 regulation, and that description defines the scope of the elements
3 for that offense. MCM, part IV, paragraph 60(b). While the actions
4 alleged, wrongfully and wantonly publishing government intelligence
5 on the Internet, could result in a violation of a lawful general
6 regulation, they do not necessarily include such a violation, and a
7 violation of a lawful general regulation, alone, would not
8 necessarily constitute an offense as described in Specification 1 of
9 Charge II. See *Jones*, 68 MJ at 471; cf. *Bonner*, 70 MJ at 3, finding
10 that assault consummated by battery is a lesser included offense of
11 wrongful sexual contact because both offenses require defense of
12 contact. The second element of the proposed LIO, Article 92(1), the
13 accused had a duty to obey the lawful general regulation is not a
14 lesser included element of Clauses 1 and 2 of Article 134. Prejudice
15 to good order and discipline and service discrediting conduct does
16 not require that the accused had a duty to obey a lawful general
17 regulation. Based on the elements as charged, it is not impossible
18 to prove a Clause 1 and 2 violation of Article 134 without also
19 proving a violation of a lawful general order. The defense's request
20 for a lesser included offense instruction for Specification 1 of
21 Charge II is denied.

22 Specifications 2, 3, 5, 7, 9, 11, and 15 of Charge II: 18
23 United States Code, Section 793(e), Clauses 1 and 2 of Article 134,

1 UCMJ. One, under *Medina*, the Court finds that violation of Clauses 1
2 and 2 of Article 134 are lesser included offenses of Clause 3 of
3 Article 134 because the Clause 1 and 2 elements are pled in the
4 specifications. The government has not presented the Court with a
5 brief addressing the defense argument that *United States v. Borunda*,
6 67 MJ 607, Air Force Court of Criminal Appeals, precludes the Clause
7 1 and 2 LIO, thus the Court declines to instruct on the LIO. The
8 government may request reconsideration upon a written filing
9 addressing the issue.

10 Ruling: the motions for LIO instructions by the parties is
11 granted in part and denied in part.

12 One, the Court will instruct on attempt as an LIO if raised
13 by the evidence for Specifications 2 through 16 of Charge II.

14 The Court will instruct on property of a value of less than
15 \$1,000 for Specifications 4, 6, 8, 12, and 16 of Charge II.

16 The Court will instruct on Clauses 1 and 2, Article 134, as
17 an LIO of Specifications 13 and 14 of Charge II.

18 The Court will not instruct on the remaining requested
19 LIOs.

20 So ordered, this eighth day of June 2012.

21 Is there anything else we need to address with this issue?

22 CDC[MR.COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, Your Honor.

1 MJ: All right. The Court has received the evidence--or the
2 evidence off--classified evidence that the government has filed ex
3 parte on what the government intends to introduce and not introduce
4 no sentencing, relevant to the Court's discovery ruling; and the
5 Court will consider that. The discovery ruling is not going to be
6 filed today. The parties--we can do one of two ways: I can do it
7 and send it to you via email and we can put it on the record at the
8 next session which would be on the 25th of June, or we can wait until
9 the 25th of June. What would the parties prefer?

10 CDC[MR.COOMBS]: The defense would prefer the former, Your
11 Honor.

12 MJ: Waiting until the 25th June?

13 CDC[MR.COOMBS]: No, Your Honor, go ahead and send the ruling to
14 the parties and then put it on the record on the 25th.

15 MJ: All right. Thank you. It's getting late in the day. Yes?

16 TC[MAJ FEIN]: We agree with the defense, Your Honor.

17 MJ: All right. I anticipate having that next week. All right.
18 Is there--and that would also be--there will be two rulings,
19 actually; one on the general discovery and one on the ruling on the
20 ex parte review of the supplement for the WikiLeaks Task Force. So,
21 both of those you can expect. Anything else we need to address
22 before we recess the Court today?

23 CDC[MR.COOMBS]: No, Your Honor.

1 TC[MAJ FEIN]: Your Honor, there's one additional issue.
2 Appellate Exhibit 130--the government had requested a sealing order
3 because it's grand jury testimony information.
4 MJ: I have that sealing--did you send me the draft in Word--
5 Microsoft Word?
6 TC[MAJ FEIN]: Yes, Your Honor, Captain Whyte did.
7 MJ: All right. I have that at issue if the parties wish to say
8 and look at it, you're free to do so; I intend to make a few
9 modifications to that order.
10 TC[MAJ FEIN]: Correction real quickly, Your Honor, Captain
11 Overgaard sent that.
12 MJ: All right. Well, I have the order. I intend to make a few
13 modifications. I'm going to do that this afternoon. It'll be ready
14 to go shortly; nothing terribly significant, basically, just
15 additional findings.
16 TC[MAJ FEIN]: Yes, Your Honor.
17 MJ: Anything else?
18 TC[MAJ FEIN]: No, Your Honor.
19 CDC[MR.COOMBS]: No, Your Honor.
20 MJ: All right. Court is in recess.
21 **[The Article 39(a) session recessed at 1510, 8 June 2012.]**

1 [The Article 39(a) session was called to order at 1308, 25 June
2 2012.]

3 MJ: This Article 39(a) session is called to order. Trial
4 Counsel, please account for the parties.

5 TC[MAJ FEIN]: Your Honor, all parties that were previously
6 present are again present except that Captain Overgaard is now
7 substituting for Captain Whyte. She has been previously sworn during
8 this court-martial.

9 MJ: All right, so Captain Overgaard is present and Captain
10 Whyte is absent, is that correct?

11 TC[MAJ FEIN]: Yes, Your Honor.

12 MJ: All right, as we discussed at the last session, the Court
13 called this Article 39(a) session, as it will continue to do, to put
14 an Article 39(a) session in between the approximately six-week
15 Article 39(a) session trial calendars to address any interim issues
16 that arise on the record.

17 And, I believe we have had a number of appellate exhibits
18 that have been marked, to include some rulings that the court had
19 made between the last Article 39(a) and this one pursuant to motions
20 that had been filed by the parties.

21 May I see the appellate exhibits that refer to the Court's
22 granting of the government's request for a 30 day delay with respect

1 to Department of Defense evidence or documents?

2 [The court reporter did as directed.]

3 MJ: All right, on 8 June, following the recess of the Court,
4 upon request of the government (defense had no objection) the
5 government requested 30 days to delay the Court's ruling on the
6 defense motion to compel discovery number two, to search for the
7 records concerning the Department of State requested by the defense
8 in its addendum to the defense motion to compel discovery number two.
9 And, the defense did not object to that request.

10 Factual findings.

11 [1.] On 7 June 2012, three Department of State witnesses,
12 specifically, Ms. Marguerite Coffey, Ms. Rena Bitter, and Mrs.
13 Catherine Brown testified during a motions hearing in the above
14 captioned court-martial. The witnesses referenced the below records
15 in their testimony. The witnesses testified that they were unaware
16 whether the below records remain in existence.

17 1) Written assessments produced by the chiefs of mission
18 used to formulate a portion of the draft damage assessment completed
19 in August of 2011.

20 2) Written situational reports produced by the WikiLeaks
21 working group between roughly 28 November 2010 and 17 December 2010.

22 [3]) Written minutes and agendas of meetings by the
23 mitigation team.

1 4) Information memorandum for the Secretary of State
2 produced by the WikiLeaks Persons at Risk Group.

3 5) A matrix produced by the WikiLeaks Persons at Risk
4 Group to track identified individuals.

5 6) Formal guidance produced by the WikiLeaks Persons at
6 Risk Group and provided to all embassies including authorized actions
7 for any identified person at risk.

8 7) Information collected by the Director of the Office of
9 Counterintelligence within the Department of State regarding any
10 possible impact from the disclosure of diplomatic cables.

11 8) Any prepared written statements for the Department of
12 State's reporting to Congress on 7 and 9 December 2010.

13 2. On 7 June 2012, the government requested the Court
14 delay the Court's ruling for 30 days on the defense motion to compel
15 discovery 2 for information pertaining to the Department of State, in
16 order to search for the above referenced records.

17 3. On 7 June 2012, the defense submitted its addendum to
18 the defense motion to compel discovery number two, and requested the
19 above records. The defense requested the prosecution produced this
20 material under Rule for Court-Martial 701(a)(2), or in the
21 alternative, Rule for Court-Martial 703. The defense also requests
22 the prosecution produces this material under Rule for Court-Martial
23 701(a)(6).

1 Order.

2 1. The government will immediately begin the process of
3 searching for and inspecting the following information.

4 (1) Written assessments produced by the chiefs of mission
5 used to formulate a portion of the draft damage assessment completed
6 on August of 2011;

7 (2) Written situational reports produced by the WikiLeaks
8 working group between roughly 28 November 2010 and 17 December 2010;

9 (3) Written minutes and agendas, meetings by the mitigation
10 team;

11 (4) Information memorandum for the Secretary of State
12 produced by the WikiLeaks Persons at Risk Group;

13 (5) A matrix produced by the WikiLeaks Persons at Risk
14 Group to track identified individuals;

15 (6) Formal guidance produced by the WikiLeaks Persons at
16 Risk Group and provided to all embassies including authorized actions
17 for any identified person at risk;

18 (7) Information collected by the Director of the Office of
19 Counterintelligence within the Department of State regarding any
20 possible impact from the disclosure of diplomatic cables; and

21 (8) Any prepared written statements for the Department of
22 State's reporting to Congress on 7 and 9 December 2010.

1 2. By 8 July 2012, the government shall notify the Court
2 which of the above records exist and for those records that do exist,
3 file a supplemental response to the defense's motion to compel
4 discovery number 2.

5 So ordered this 8th day of June 2012.

6 All right, there were additional filings that concern the
7 addendum to the defense motion to compel discovery two.

8 May I see those please?

9 [The court reporter provided Appellate Exhibit 175 to the Military
10 Judge.]

11 MJ: All right, on the 18th of June, the defense filed an
12 addendum number two to defense motion to compel discovery number two,
13 request for witnesses. Now, Mr. Coombs, would you like to set forth
14 that filing and what it is and why you did it for the record?

15 CDC[MR. COOMBS]: Yes, ma'am. The defense submitted two
16 requests for witnesses: One a request for the Court to order a
17 witness--witnesses from ONCIX, from the FBI, and from DHS. Then,
18 based upon the Court's denial of that request, the defense submitted
19 a request for reconsideration. It is defense's belief that the
20 witnesses are needed in order to clarify when the government was
21 aware of certain facts and how they became aware of them. And, we
22 believe that witnesses from ONCIX, and this will be covered a little
23 bit in the due diligence motion, but witnesses from ONCIX, the FBI,

1 and DHS would allow the Court to know when the government became
2 aware of the various damage assessments or impact statements and
3 therefore, also determine how the government's representations to the
4 Court at various times comport with the knowledge that they had from
5 the various agencies. Particularly, the ONCIX we believe is very
6 important because again, when you take a look at when the government
7 says they knew certain things based upon various meetings both on 18
8 May, apparently, then 24 and then 31 May, where they said they became
9 aware of certain information, that does not seem to comport with the
10 information that we are now receiving. It is clear that the
11 government knew ONCIX had something. So, we believe having the
12 benefit of these witnesses, much like having the benefit of having
13 the Department of State witnesses, would be important so that we can
14 lay the groundwork as to what the agencies -- their individual
15 representations to the government.

16 MJ: All right. Government, would you like to address this
17 issue?

18 TC[MAJ FEIN]: Your Honor, the United States objected based on
19 ultimately two reasons; one, they were not necessary for why the
20 defense needed--or, for the due diligence motion they filed, and
21 second, timeliness of their request. They had asked for three
22 separate government agency employees to come testify on behalf of the
23 departments with four duty days prior to this motions hearing.

1 MJ: All right, for the record, the addendum number two to the
2 defense motion to compel discovery, request for witnesses, was dated
3 18 June 2012, and that is Appellate Exhibit 152. Prosecution's
4 response to the defense motion for request--excuse me, let me see the
5 Court orders please. I don't believe I have those Court orders with
6 respect to the addendums.

7 [The court reporter did as directed.]

8 MJ: All right. What we will do is we will identify the orders
9 as appellate exhibits, but the Court denied the request for witnesses
10 as untimely and not relevant and necessary for the Court's decision
11 today with respect to the defense's due diligence motion. Defense
12 filed a request for reconsideration of that ruling on the 21st of
13 June, that has been marked as Appellate Exhibit 153; and the
14 prosecution response to the defense motion is at Appellate Exhibit
15 154; and, the Court's ruling denying the reconsideration is dated 21
16 June 2012 and that is at Appellate Exhibit 155.

17 Is there anything else we need to address with respect to
18 that issue?

19 CDC[MR. COOMBS]: No, Your Honor.

20 TC[MAJ FEIN]: No, Your Honor.

21 MJ: All right, also in between the last session and this
22 session, on the court calendar for the July session was the
23 prosecution's motion to file a motion *in limine* to include a motion

1 under military rule of evidence 404(b), which regards uncharged
2 misconduct. And, the government requested to delay its filing until
3 the August Article 39(a) session after the instructions are clearly
4 defined and the parties and I will be addressing instructions at the
5 July Article 39(a) session. The government did not object to that so
6 the Court--Yes?

7 TC[MAJ FEIN]: I am sorry, just to clarify Your Honor, it is the
8 government's motion.

9 MJ: I am sorry, the defense did not object to that motion so
10 the Court allowed the government to do that.

11 And excuse me, just one housekeeping matter with respect to
12 the last issue with respect to the Court's order, the first order,
13 denying the motion *in limine*, that was on 19 June 2012 and that is
14 Appellate Exhibit 149. All right, the Court also sent out an order--
15 or, an e-mail to the parties with respect to the upcoming Article 13
16 motion and the speedy trial motion to build into the case calendar an
17 exchange of witness lists before the Article 39(a) session prior to
18 those motions being held so that if there is any dispute as to what
19 witnesses will be called, that dispute can be resolved in advance of
20 the motions.

21 Does either side desire to be heard on that?

22 CDC[MR. COOMBS]: No, Your Honor.

23 TC[MAJ FEIN]: No, Your Honor.

1 MJ: The Court had also asked the parties to file targeted
2 briefs with respect to the government's motion to preclude mention of
3 absence of actual harm on the merits of the trial or during the
4 merits of the trial and the parties have done that. The prosecution
5 supplement is Appellate Exhibit 158 and that is dated the 21st of
6 June 2012. The defense brief is Appellate Exhibit 164 and that is
7 also dated the 21st of June 2012. This motion will once again be on
8 the calendar for the July Article 39(a) session.

9 Does either side desire to be heard at this point?

10 CDC[MR. COOMBS]: No, Your Honor.

11 TC[MAJ FEIN]: No, Your Honor.

12 MJ: All right, and finally the Court has issued two rulings,
13 one regarding the defense motion to compel discovery number two, and
14 one regarding the WikiLeaks Taskforce. And, those have been marked
15 as Appellate Exhibit--the ruling on the defense motion to compel
16 discovery two is dated 22 June 2012 and has been marked as Appellate
17 Exhibit 147. And, the ruling on the defense motion to compel
18 discovery of the damage assessments for the WikiLeaks Taskforce is
19 also dated 22 June 2012 and it is marked as Appellate Exhibit 46.

20 TC[MAJ FEIN]: Ma'am, 146?

21 MJ: 146, excuse me. Thank you.

22 With respect to the defense motion to compel discovery
23 number two, the Court found and ruled as follows.

1 On 10 May 2012 the defense moved to compel discovery number
2 two in accordance with R.C.M. 701(a)(2), 701(a)(5), 701(a)(6), and
3 905(b)(4), Article 46 UCMJ and the Fifth and Sixth amendments to the
4 Constitution. On 2 June 2012, the defense filed a motion for
5 modified relief; on 7 June 2012, the defense filed an addendum to the
6 motion to compel discovery number two; and on 18 June 2012, the
7 defense filed a second addendum. The government opposes. On 31 May
8 2012, the government provided the court with notice of ONCIX damage
9 assessment. On 2 June 2012, the defense responded.

10 After the considering the pleadings, evidence presented and
11 argument of counsel, the Court finds and concludes the following.

12 Discovery at issue.

13 1. Full investigative files by the Army Criminal
14 Investigation Division, CID; Defense Intelligence Agency, DIA;
15 Defense Information Systems Agency, DISA; and the United States
16 Central Command, CENTCOM; United States Southern Command, SOUTHCOM;
17 related to PFC Manning, WikiLeaks, and/or the damage occasioned by
18 the alleged leaks, in accordance with R.C.M. 702--701(a)(2).

19 [2.] The Headquarters, Department of the Army file related
20 to the 17 April 2012 discovery request in accordance with R.C.M.
21 701(a)(2) and R.C.M. 701(a)(6).

22 3. The entire FBI Diplomatic Security Services, DSS;
23 Department of State, DoS; Department of Justice, DoJ; government

1 agency, Office of the Director of National Intelligence, ODNI; and
2 Office of National Counterintelligence Executive, ONCIX, files in
3 relation to PFC Manning and/or WikiLeaks. Or, in the alternative,
4 produced for *in camera* review to determine whether the evidence is
5 discoverable under R.C.M. 701(a)(2). If the Court determines that
6 the files are not within the possession, custody, or control of
7 military authorities, the defense requests the Court order production
8 as relevant and necessary under R.C.M. 703(f).

9 (a) FBI. (1) FBI investigation. Defense alleges the
10 government has produced heavily redacted files containing only
11 material favorable to the defense and moves for discovery of the
12 entire report of investigation involving PFC Manning or WikiLeaks.

13 (2) On 31 May 2012, the government notified the defense that the FBI
14 conducted an impact statement for which the government intends to
15 file an *ex parte* motion under M.R.E. 505(g)(2).

16 (b) DSS. Defense alleges government has disclosed only
17 items charged in Specification 14 of Charge II and moves to compel
18 DSS files dealing with Specification 12 and 13 of Charge II. The
19 government states it has disclosed the entire file.

20 (c) Department of State. Defense moves to compel (1) chief
21 of mission review of released cables that affected posts concerning
22 initial assessment as well as their opinion regarding the overall
23 effect that the WikiLeaks release could have on relations with the

1 host country, if any. The chiefs of missions produced written
2 assessments of the leaked cables based upon their independent review;
3 these written submissions were then used to formulate a portion of
4 the damage assessment completed in August of 2012. (2) WikiLeaks
5 working group documents, particularly written situation report
6 approximately twice a week during the group times--time period of
7 operation, roughly from 28 November 2010 through 17 December 2010.
8 (3) Mitigation team documents, particularly written minutes of its
9 meetings and written agendas for its work; part of the mitigation
10 team's efforts concentrated on counterterrorism concerns. (4) The
11 persons at risk group information memorandum for the Secretary of
12 State matrix to track identified individuals and formal guidance to
13 all embassies concerning the Department of State's efforts and
14 authorized actions for any identified person at risk. (5)
15 Information collected by the Director of the Office of
16 Counterintelligence within the Department of State regarding any
17 possible impact from the disclosure of diplomatic cables intended to
18 possibly be used to update the August 2011 damage assessment--draft
19 damage assessment. And, (6) the Department of State's reporting to
20 Congress to include a prepared written statement for congressional
21 testimony on 7 and 9 December 2010 and congressional testimony by
22 Ambassador Patrick Kennedy, his testimony on 11 March 2012 for
23 members of the House of Representatives and Senate and House

1 permanent select committee on intelligence; and, DoS reports to
2 Congress concerning any effects caused by WikiLeaks disclosure and
3 steps undertaken to mitigate them; two briefings for members of the
4 House of Representatives and Senate in December of 2010.

5 On 8 June 2012, the court granted the government's request
6 for 30 days to determine whether the above records exist. On 9 July
7 2012, the government will notify the Court whether such records exist
8 and file a supplemental response to the government's motion to compel
9 discovery for those records that do exist.

10 All right, I believe in the prior response on that 30 days,
11 that I granted to the Court, I said 8 July. I believe that is on a
12 Sunday so we are going to change that to 9 July, which is on a
13 Monday.

14 TC[MAJ FEIN]: No issues here, Your Honor.

15 MJ: (d) Department of Justice documents related to the
16 investigation of PFC Manning and WikiLeaks.

17 (e) CIA internal investigation or damage assessment.

18 (f) ODNI internal review of DoS cables.

19 (g) ONCIX documents relating to PFC Manning or WikiLeaks.

20 The government has provided 12 pages of *Brady* material on
21 31 May 2012. The government provided notice to the Court that ONCIX
22 has a draft damage assessment with a coordinated version complete

1 approximately 13 July 2012 and agreed to provide the draft damage
2 assessment to the Court for *in camera* review.

3 4. *Brady* material from the interagency committee review,
4 President's Intelligence Advisory Board, House of Representatives
5 oversight committee.

6 5. All evidence intended for use in the government's case
7 in chief obtained by Department of the Army, DISA, CENTCOM, SOUTHCOM,
8 FBI, DSS, DoS, DoJ, government agency, ODNI, and ONCIX.

9 6. All aggravation evidence the government intends to
10 introduce in sentencing from DA, DISA, CENTCOM, SOUTHCOM, FBI, DSS,
11 DoS, DoJ, government agency, ODNI, and ONCIX.

12 7. The entire CID, DIA, DISA, and CENTCOM and SOUTHCOM
13 files related to PFC Manning, WikiLeaks, and or a damage occasioned
14 by the leaks to include documents, reports, analyses, files,
15 investigations, letters, working papers, and damage assessments.
16 Defense alleges these are material to the preparation of the defense
17 as they will show what, if any, damage was caused by the leaks.

18 8. Interagency committee review. The results of any
19 investigation or review concerning the alleged leaks by Mr. Russell
20 Travers, national security staff senior advisor for information
21 access and security policy. Defense alleges Mr. Travers was asked to
22 lead a comprehensive effort to review the alleged leaks.

1 9. President's Intelligence Advisory Board. Any report or
2 recommendation concerning the alleged leaks by Chairman Chuck Hagel
3 or any other member of the Intelligence Advisory Board.

4 10. House of Representatives oversight committee. The
5 results of any inquiry and testimony taken by the House of
6 Representatives oversight committee led by Representative Darrell
7 Issa. The committee considered the alleged leaks, the actions of
8 Attorney General Eric Holder, and the investigation of PFC Manning.

9 Defense further moved the court to require that the
10 government to state with specificity the steps it has taken to comply
11 with Rule for Court-Martial 701(a)(6).

12 That issue will be addressed at the Article 39(a) session
13 today, 25 June 2012.

14 The law.

15 1. The due process clause of the Fifth Amendment requires
16 the government to disclose evidence that is material and favorable to
17 the defense, *Brady v. Maryland*, 373 US 83 1963.

18 2. Discovery in the military justice system is governed by
19 Article 46 UCMJ, providing equal opportunity for the parties to
20 obtain witnesses and evidence and R.C.M. 701, implementing Article
21 46. These rules provide broader discovery and that required by the
22 *Brady* constitutional standard, *US v. Williams*, 50 MJ 46, Court of
23 Appeals for the Armed Forces, 1999; *US v. Simmons*, 38 MJ 376, Court

1 of Military Appeals 1993; *United States v. Behenna*, 70 MJ 521, Army
2 Court of Criminal Appeals 2011. *United States v. Truqueros*, 69 MJ
3 604, Army Court of Criminal Appeals 2010. R.C.M. 701(a)(6) requires
4 that the trial counsel, as soon as practicable, disclose to the
5 defense the existence of evidence known to the trial counsel which
6 reasonably tends to negate the guilt of the accused of an offense
7 charged, reduce the guilt of the accused for an offense charged, or
8 reduce the punishment. R.C.M. 701(a)(2) requires the trial counsel,
9 after service of charges, upon request of the defense, to permit the
10 defense to inspect any books, papers, documents, photographs,
11 tangible objects, buildings, or places which are within the
12 possession, custody, or control of military authorities and which are
13 material to the preparation of the defense or are intended for use by
14 the trial counsel as evidence in the prosecution's case in chief at
15 trial, or were obtained to or belong to the accused. The Court of
16 Appeals for the Armed Forces has interpreted R.C.M. 701(a)(2) to
17 require the trial counsel to disclose to the defense, discoverable
18 information regardless of when the government intends to use it,
19 *United States v. Luke*, 69 MJ 309, Court of Appeals for the Armed
20 Forces, 2011.

21 3. The government has a due diligence duty to search for
22 discoverable information both under *Brady* and R.C.M. 701. The scope

1 of the prosecution's requirement to search government files beyond
2 the prosecutor's own files is generally limited to:

3 (1) The files of law enforcement authorities that have
4 participated in the investigation of the subject matter of the
5 charged offenses;

6 (2) Investigative files in a related case maintained by an
7 entity closely aligned with the prosecution; and

8 (3) Other files, as designated in a defense discovery
9 request that involved a specified type of information within a
10 specified entity. The parameters of the review depend on the
11 relationship of the other government entity to the prosecution and
12 the nature of the defense discovery request. The outer parameters
13 are ascertained on a case-by-case basis, *US v. Williams*, 50 MJ 46,
14 Court of Appeals for the Armed Forces, 1999, holding that the trial
15 counsel had no duty to review unit disciplinary records for
16 information concerning any investigations or prosecutions of
17 government witnesses where defense did not specifically request a
18 review of such files. In *Williams*, the defense filed a general
19 request for, "Any and all investigations or possible prosecutions
20 pending which could be brought against any witness the government
21 intends to call during the trial." *Williams* held this was not a
22 specific request and the trial counsel was not required to review the
23 unit files in which the information was located. *Williams* went on to

1 state that, "While the government has a duty to review prosecution
2 and police files readily available to the prosecution; it is not
3 required to search for 'a needle in a haystack.'"

4 4. The government does not have a discovery obligation
5 under R.C.M. 701(a)(2) unless the discovery at issue is within the
6 possession, custody, or control of military authorities and is
7 material to the preparation of the defense or intended for use by the
8 trial counsel as evidence in the prosecution's case in chief. At
9 trial, what was obtained from or belonged to the accused; to the
10 extent relevant files are known to be under the control of another
11 government entity, the prosecution must make that fact known to the
12 defense and engage in good-faith efforts to obtain the material.
13 *Williams*, quoting *Simmons*, citing to the standard 11-2.1(a),
14 Commentary, American Bar Association Criminal Justice Discovery
15 Standards 14 note 9 (3d ed. 1995).

16 5. Evidence maintained by other government agencies,
17 whether aligned with the prosecution or not, are not within the
18 control of military authorities in accordance with R.C.M. 701(a)(2);
19 see analysis to R.C.M. 701(a)(2), "Except for subsection (e), the
20 rule deals with discovery in terms of disclosure of matters known to
21 or in the possession of a party. Thus the defense is entitled to
22 disclosure to the matters known to the trial counsel or in the
23 possession of military authorities. Except as provided in subsection

(e), the defense is not entitled under this rule to disclosures of matters not possessed by military authorities or to have the trial counsel seek out and produce such matters for it. Subsection (e) may accord the defense the right to have the government assist the defense to secure the evidence or information, when not to do so would deny the defense similar access to what the prosecution would have if it were seeking access to the evidence or information. See *United States v. Killebrew*, 9 MJ 154, Court of Military Appeals, 1980; *Halfacre v. Chambers*, 5 MJ 1099, Court of Military Appeals, 1976."

6. The burden is on the defense for production of evidence outside of the control of military authorities for discovery under the relevant and necessary standard in R.C.M. 703(f). Evidence that is material to the preparation of the defense under the control of other government agencies can be relevant and necessary for discovery requiring production of the evidence from the other government entities pursuant to R.C.M. 703(f)(1) and (4)(A).

7. For files pertaining to PFC Manning within the possession, custody, or control of military authorities that the government is aware of and to search for *Brady* material, trial counsel must turn over to the defense any information that is obviously material to the preparation of the defense. This does not mean that the government must search for information material to the

1 preparation of the defense without a specific discovery request.
2 Where a request is necessary, it is required to trigger the trial
3 counsel's duty to disclose as a means of specifying what must be
4 produced. Without such a request, the trial counsel might be
5 uncertain as to the extent of the duty to obtain matters not in his
6 or her immediate possession. Any request should state with
7 reasonable specificity what matters are sought; see analysis to
8 R.C.M. 701(a).

9 Conclusions of law.

10 1. Files under the possession, custody, or control of
11 military authorities. The government will seek out and identify such
12 files regarding PFC Manning that involved the investigation, damage
13 assessment--that involved the investigation, damage assessment, or
14 mitigation measures. By 20 July 2012, the government will notify the
15 Court with a status of whether it anticipates that any government
16 entity that is the custodian of classified evidence that is the
17 subject of the defense motion to compel will seek limited disclosure
18 in accordance with the M.R.E. 505(g)(2) or claim a privileged in
19 accordance with M.R.E. 505(c) for the classified information under
20 that agency's control. Also, by 25 July 2012, if the relevant agency
21 claims of privilege under M.R.E. 505(c) and the government seeks an
22 *in camera* proceeding under M.R.E. 505(i), the government will move
23 for *in camera* proceeding in accordance with M.R.E. 505(i)(2) and (3)

1 and provide notice to the defense under M.R.E. 505(i)(4)(A). For all
2 such files where a privilege under M.R.E. 505(c) is not claimed, by 3
3 August 2012, the government will disclose such files regarding PFC
4 Manning that involve investigation, damage assessments, or mitigation
5 measures to the defense or submit them to the Court for *in camera*
6 review under R.C.M. 701(g) or for limited disclosure under M.R.E.
7 505(g)(2).

8 2. Aligned Agencies.

9 Department of Justice. Defense moves to compel documents
10 from DoJ related to the accused, WikiLeaks, and/or alleged leaks
11 because the government collaborated with federal prosecutors within
12 DoJ during the investigation of the accused. Such files are not
13 discoverable under R.C.M. 701(f), as such, the defense has not shown
14 relevance and necessity for production of DoJ files under R.C.M.
15 703(f).

16 FBI DSS. The FBI and DSS are aligned agencies that
17 conducted an investigation of PFC Manning in conjunction with CID.
18 The government advised the Court it had disclosed the entire DSS
19 file--investigation to the defense. The Court finds the defense has
20 shown that the FBI file, minus grand jury testimony, to the extent
21 relevant to an investigation of PFC Manning is material to the
22 preparation of the defense to the extent that it is relevant and
23 necessary for production under R.C.M. 703(f). The Court will review

1 the FBI impact statement *in camera* to determine whether it is
2 material to the preparation of the defense to the extent relevant and
3 necessary to require production for disclosure. The government will
4 immediately begin the process of producing the FBI investigative file
5 and impact statement in accordance with R.C.M. 703(f)(4)(A). By 25
6 July 2012, the government will notify the Court with a status of
7 whether it anticipates any government entity that is the custodian of
8 classified evidence that is the subject of the defense motion to
9 compel will seek limited disclosure under M.R.E. 505(g)(2) or claim a
10 privileged in accordance with M.R.E. 505(c) for the classified
11 information under that agency's control. Also, by 25 July 2012, if
12 the relevant government agency claims a privilege under M.R.E. 505(c)
13 and the government seeks *in camera* proceeding under M.R.E. 505(i),
14 the government will move for an *in camera* proceeding in accordance
15 with M.R.E. 505(i)(2) and (3) and provide notice to the defense under
16 M.R.E. 505(i)(4)(A). For all such files where privilege under M.R.E.
17 505(c) is not claimed, by 3 August 2012, the government will disclose
18 such files regarding PFC Manning that involve investigation, damage
19 assessment, or mitigation measures to the defense or submit them to
20 the Court for *in camera* review under R.C.M. 701(g) or for limited
21 disclosure under M.R.E. 505(g)(2).

22 ODNI ONCIX. No later than 3 August 2012 the government
23 will provide the Court with the damage assessment for *in camera*

1 review. The government has stated in its brief that ONCIX is not an
2 aligned agency but has not asked the Court to reconsider the portion
3 of the 23 March 2012--a ruling stating that it was.

4 CIA. The Court has conducted an *in camera* review of the
5 WikiLeaks Taskforce damage assessment and the proposed government
6 substitute in accordance with M.R.E. 505(g)(2). The court's ruling
7 with respect to this damage assessment is issued as a separate
8 Appellate Exhibit.

9 Other; DoS. The court granted the government's request for
10 30 days to respond to the defense motion to compel DoS documents on 9
11 July 2012. The government will advise which files exist and provide
12 its position to the Court in accordance with the Court's order of 8
13 June 2012.

14 17 April 2012, HQ DA file. The government alleges there is
15 no "file". What, if any, file exists will be addressed at today's
16 Article 39(a) session on 25 June 2012.

17 Government evidence on merits and sentencing. No later
18 than 3 August of 2012, the government shall disclose evidence it will
19 introduced on the merits and during sentencing.

20 Interagency committee review, President's Intelligence
21 Advisory Board, and House of Representatives oversight committee.
22 The defense moves to compel the government to conduct *Brady* searches
23 of the files of those entities. These are nonaligned entities who

1 have had no interaction with, or involvement with, the prosecution or
2 the criminal investigation in this case. Their files are not readily
3 available to the prosecution. The prosecution has had no access to
4 these entities or their files. Although the defense made a specific
5 request that the Court compel the government to conduct a *Brady*
6 search of these files, the Court finds that the files of these
7 entities are too attenuated and beyond the outer perimeters of the
8 core files the prosecution must search for under *Brady*. The
9 government advised the court it had an ethical obligation to search
10 the President's Intelligence Advisory Board for *Brady* material
11 because it had a reason to believe the files contain *Brady* material.
12 As such, the government will conduct a *Brady* search of the
13 President's Intelligence Advisory Board files. The Court does not
14 compel the prosecution to search the files of the interagency
15 committee review or the House of Representatives oversight committee.

16 Ruling.

17 The defense Motion to Compel Discovery 2, is granted in
18 part as set forth above.

19 So ordered this 22nd day of June 2012.

20 Now before we continue, let's address a couple of the
21 issues that this ruling said we would address today. The 17 April
22 2012 file; Government, what do you mean there is no file?

1 TC[MAJ FEIN]: Your Honor, yesterday the government confirmed
2 with Headquarters, Department of the Army Staff that Headquarters
3 Department of the Army does not contain, or does not possess a
4 centralized filing file that deals with Private First Class Manning,
5 WikiLeaks, any damage or mitigation efforts. From within the
6 Department of the Army, the prosecution has produced files that did
7 exist, centralized files such as the two CID investigations, the
8 three military intelligence investigations and three different 15-6s.
9 As far as the Headquarters, DA, what is clear from what the defense
10 has proffered in their motion to compel is a letter, a staffing
11 letter, from the Director of the Army Staff who tasked all of the
12 principals of the Headquarters, Department of the Army staff in order
13 to collect the information or to provide it to the prosecution. The
14 information was contained within individual's--government does not
15 know where it was contained, but it was not contained in the
16 centralized filing. It was accumulated, it was organized, and then
17 given to the prosecution pursuant to our request for that
18 information.

19 MJ: Okay, what was accumulated and given to the prosecution?

20 TC[MAJ FEIN]: Your Honor, after reviewing briefly the volume of
21 information, it includes PowerPoint briefings, predecisional working
22 papers for either policy or decision making, Public Affairs guidance
23 and updates, updates and SITREPs on systems that could have been

1 affected or that were not affected, reports on mitigation efforts
2 within the department, reports on how different organizations within
3 the Department of the Army responded to the recommendations and
4 findings of the Secretary of the Army's 15-6 that was ordered and
5 completed, which the defense has a complete copy of the entire 15-6,
6 staff meeting notes and also including some e-mails.

7 MJ: So, did these files that you are talking about come in
8 response to the 17 April 2012----

9 TC[MAJ FEIN]: Yes, Your Honor. They were accumulated and given
10 to the prosecution in response to that tasker which was in response
11 to the prosecution's request a year before.

12 MJ: Is there a file pertaining to the, whatever it was, that
13 generated that 17 April 2012 tasker to go out to begin with?

14 TC[MAJ FEIN]: No, Your Honor. The reason the tasker went out
15 from the Director of the Army Staff was because there was no
16 centralized information that kept any of what I just described. So,
17 once that information was compiled through the Headquarters, DA
18 staffing process based off the Director ordering it, once that was
19 compiled and on multiple CDs and in multiple forms, that information
20 was then bound together and given to the prosecution as it was. And
21 there was not even--I think--I do not know if a copy was retained by,
22 for instance, OTJAG, who was our conduit. But, that information,
23 again, was compiled for this litigation for us to start reviewing for

1 any type of *Brady* or 701(a)(6) material. And then, that is what we
2 have now to review.

3 MJ: Okay. So, if I am understanding the government correctly,
4 this letter that went out saying that we have been--where is that?
5 May I see that Appellate Exhibit that contains that file?

6 TC[MAJ FEIN]: Yes, Your Honor.

7 CDC[MR. COOMBS]: And, that is Attachment B, to Appellate
8 Exhibit 96. Excuse me, Attachment A to Appellate Exhibit 96.
9 [The court reporter provided Attachment A to Appellate Exhibit 96 to
10 the Military Judge.]

11 MJ: So, if I am understanding you, Major Fein, you are saying
12 that this Army staffing form that is here at Attachment A of the
13 Appellate Exhibit 96 is the complete file of what it was that
14 generated the memo that went out on the 17th April 2012 with a
15 suspense date of 23 April 2012 for principal officers at
16 Headquarters, Department of the Army?

17 TC[MAJ FEIN]: Yes, Your Honor. That is what was confirmed to
18 me yesterday that, I guess, absent our letter which was--is
19 referenced in the actual DA form--Headquarters DA form 5, the "key
20 points", the second bullet where it says the Army prosecutors are
21 requesting that information. There was an original letter that was
22 sent through the Department of Defense. This is what was generated
23 from that. And then, at the very first of that attachment, the first

1 page, signed by Lieutenant General Troy, was the actual tasker to
2 accomplish what we requested and then they accumulated.

3 MJ: Does the defense have the letter?

4 TC[MAJ FEIN]: They do not have the letter from what they
5 produced to us, Your Honor, nor have they asked for the letter.

6 MJ: Okay. Anything else from the government?

7 TC[MAJ FEIN]: Just one other note, Your Honor. A similar
8 process did happen also at the Department of Defense level, so this
9 decision would also apply, although the defense has not ask for it.
10 We are just notifying the Court that we have also received documents
11 from DoD, not just Department of the Army. So, it would essentially
12 be the same.

13 MJ: All right. Mr. Coombs?

14 CDC[MR. COOMBS]: A couple of issues, Your Honor. First, the
15 DoD, we might not have asked for it because we do not know about it.
16 The only reason we know about this is because of the fact that it was
17 sent to us inadvertently because we were--TDS was viewed as one of
18 the staffing agencies, apparently, where the file was sent.
19 Otherwise, we would not know that nothing was done on the HQ, DA.
20 The questions that the defense would have--I am not surprised that
21 this is the only document that was in existence other than the
22 prosecution's request to start collecting the *Brady* material, because
23 nothing was done on this, as the Court knows, for nine months. No

1 activity was done until someone up at HQ, DA realized that we needed
2 to collect this information. So, that is not surprising that this is
3 the extent of the file. But here, the letter signed by Lieutenant
4 General Troy, the suspense that he gives, ma'am, is 23 April, to
5 collect this information. And, if I understand the government
6 correctly, there is a file now of all of this information and that is
7 because Lieutenant General Troy's staffed--or directed all of the
8 various principal agencies to compile the information. So, at this
9 point then, what the defense would like to know is, "To what extent
10 is there a file now, based upon this, that the government is looking
11 through and what is the size of that file?"

12 MJ: All right. Well, there is two different issues that I am
13 seeing here. One is the file itself, the 17 April 2012 file which
14 the defense now has. If you want the letter, please ask the
15 government give you the letter. Same thing for the Department of
16 Defense file itself that led to the letter that was generated out the
17 field. The motion to compel already addresses what government's
18 obligations are respect to R.C.M. 701(a)(6) and 701(a)(2) with
19 respect to whatever is in that file. So, pursuant to what the court
20 has ruled, the motion to compel discovery 2, the government is going
21 to be searching those files accordingly, is that right?

22 TC[MAJ FEIN]: Yes, Your Honor.

23 MJ: Okay.

1 CDC[MR. COOMBS]: Your Honor, unless the Court wants to handle
2 it later, this may be a good time to handle Appellate Exhibit 171,
3 the defense' request for clarification.

4 MJ: Let's--before we do that, there was another, I believe--
5 there was another issue that we were going to look at today. All
6 right, that is actually the due diligence motion. So, yes, this
7 would be a good time to do that. First of all, does the government
8 have anything else with respect to the issue with the 17 April file?

9 TC[MAJ FEIN]: No, Your Honor.

10 CDC[MR. COOMBS]: Your Honor, in Appellate Exhibit 171, the
11 defense requested for clarification of the Court's ruling of
12 Appellate Exhibit 146. Specifically, on Paragraph 7 of page 5, the
13 defense asked the Court to clarify its statement of, "For files
14 pertaining to PFC Manning within the possession, custody, or control
15 of military authorities, the government is aware of or has searched
16 for *Brady* material. Trial counsel must turn over to the defense any
17 information that is obviously material to the preparation of the
18 defense." We requested clarification for two reasons. One, the
19 initial exchange between the Court and the government on what is
20 material to the preparation of the defense and what their obligation
21 was in order to turn that over, as we cited from the record of trial,
22 there was an exchange between the Court and Major Fein on this issue
23 and it was clear that Major Fein had an added requirement to the

1 701(a)(2) and that was that it has to be part of a specific request
2 by the defense and the Court corrected the government saying that is
3 not the standard, that if you are looking through your files and you
4 see something that you think, "Boy, if I were defense counsel, I sure
5 would want this." And, that is material to the preparation of the
6 defense. The Court asked if the government was going to turn it over
7 and they said, "Yes." Then, the Court sought clarification to ensure
8 that the government understood and that is, again, where the
9 government went back to, "well, as long as they give a specific
10 request." And then, the court then said, "Look, we are going into a
11 circular argument here. If you see something that is material to the
12 preparation of the defense, you have to hand it over. You do not
13 wait, you just handed over." So, based upon the Court's ruling here,
14 the defense would ask for five different types of clarification. The
15 first is to clarify that this order does not just apply
16 retroactively, it also applies prospectively. So, for files that
17 they are reviewing now, forward, the government has to be looking at
18 this through the eyes of 701(a)(2), if it is material to the
19 preparation of the defense, they see something, not subject to a
20 specific request, but if they are just looking through files in their
21 possession and they see something that is material to the preparation
22 of the defense, they have to hand it over. They do not hold onto it.
23 Second, to the extent that the government has done a search before,

1 based upon the government's representations to the Court of its
2 understanding of when this had to hand over 701(a)(2) information, we
3 would request that if the government has reviewed this material under
4 the correct standard, that it goes back and reviews the material that
5 is in its possession, custody, and control using the correct
6 701(a)(2) standard that the Court lays out in its ruling, information
7 that is relevant and helpful to the preparation of the defense.
8 Something that a defense counsel, if we had the ability to sit down
9 and look at their files, we would say, "You know what, that is
10 something that is helpful. That is something that we would like to
11 have." That is the eye that the government has to look at this
12 information and then hand it over when they identify the information,
13 not hold onto it, wait for a specific request. Third, the government
14 alluded to the fact that they had been searching files and either
15 that they have a log or some database of information that they
16 believe was 701(a)(2), but they had not received a specific request
17 for it and so, they were not going to hand over. And, if you look at
18 our request for clarification, the government talked about this log
19 or database. So, the defense would ask that the Court clarify
20 whether or not the government, in fact, does have in its possession
21 something that the government said it would get back to the court on
22 anyways, the amount of material that they have that is material to
23 the preparation of the defense and whether or not they are actually

1 holding onto anything at this point based upon their understanding
2 that they could do so absent a specific request by the defense.
3 Fourth, order that this 701(a)(2) standard applies to all files for
4 the government has looked at, not just *Brady* files that they have
5 been looking at. But, if the government has files in their
6 possession and they come across information that they believe is
7 material to the preparation of the defense, they have an obligation
8 just to hand it over. So, it cannot be just information that they
9 are viewing just for *Brady*. If they come across information that
10 they think is material for the preparation of the defense, they have
11 to give it to the defense. And then, finally to clarify, and the
12 defense proposes an additional clarification for the benefit of the
13 government, by the Court, of what is, "Material to the preparation of
14 the defense," to ensure that the government is doing this under the
15 correct standard. Granted, that it has to be relevant, but then
16 using the correct standard of, "helpful to the defense," viewing it
17 through the eyes of defense counsel preparing for their case, what
18 information would a defense counsel want to know, and then to start
19 surrendering that information. So, we request that the court issue
20 the requested clarifications within Appellate Exhibit 171.

21 Thank you, Your Honor.

22 MJ: All right. Government, this was filed on 23 June 2012, two
23 days ago, do you have a position on it at this point?

1 TC[MAJ FEIN]: Yes, Your Honor. May I have a moment?

2 MJ: Okay, proceed.

3 TC[MAJ FEIN]: Your Honor, if it may please the Court, may I
4 respond from the counsel table?

5 MJ: Certainly.

6 TC[MAJ FEIN]: Your Honor, just to go through the quick list,
7 the defense has asked for five, I guess, remedies or corrections to
8 the Court's order. One and two seem to be molded together,
9 retroactive and prospective look. There still seems to be some
10 confusion on, of course, what is discoverable or not. The government
11 is ready to absolutely execute the Court's order, but depending on
12 the Court's order, we absolutely will review the material either
13 retroactively and prospectively, we view the Court's order as it
14 stands, to mean anything we have already looked at and to continue
15 going, but not having the obligation to search for material that we
16 are not otherwise looking at without a defense request. For the
17 second--excuse me, the third issue, "Log of information," to respond
18 to the Court, last session, the prosecution does keep track of
19 information that is discoverable or not and depending on the type of
20 information, where it came from, the different standards, we do not
21 necessarily keep track of those different standards. So, we do know
22 absolutely what has been produced and what has not and we keep track
23 of that down to the document level. Third, Your Honor----

1 MJ: So, just to make sure I am understanding you there, you
2 know what has been produced and what has not but you do not know
3 under what, whether it is *Brady* or 701(a)(6), whether it was
4 701(a)(2)?

5 TC[MAJ FEIN]: Well frankly, Your Honor, up until this point of
6 litigation, we have produced all material that we have deemed
7 701(a)(2) that has been obviously material to the preparation of the
8 defense. The issue that we are contesting is the application of that
9 standard. So, if the standard--if the Court's order changes the way
10 we have been going, then no--excuse me, yes, we would then have to go
11 back, but we have a log to track exactly what we have and have not
12 done.

13 MJ: Okay, you have my order.

14 TC[MAJ FEIN]: Yes, Your Honor.

15 MJ: So I guess, what is written understanding of your
16 obligations now?

17 TC[MAJ FEIN]: Well, Your Honor, according to your order, the
18 way it is written, is that any document that we review from this
19 point forward or that we have reviewed for *Brady* that is obviously
20 material, that term used by the court, "Obviously material to the
21 preparation of the defense", then we are required to turn that over
22 regardless of the defense request.

23 MJ: All right. And, the following paragraph of that?

1 TC[MAJ FEIN]: The conclusions of law, paragraph 1, bottom of
2 page 5, Your Honor. "Files under possession, custody, or control of
3 military authorities," essentially, the Court has defined what would
4 be material to the preparation of the defense and that is that we
5 will seek out and identify such files regarding PFC Manning that
6 involve investigation, damage assessments, or mitigation measures
7 within the possession, custody, or control of military authorities.

8 MJ: All right, so that is what the defense is--or, that is what
9 the Government is going to review the files that it currently has
10 for?

11 TC[MAJ FEIN]: Absolutely, Your Honor. With that guidance,
12 specific guidance, which gets now back to the confusion that has gone
13 on about what is material to the preparation of the defense and the
14 application of 701(a)(2), because although last time, absolutely,
15 there was a circular argument going on between myself and the Court.
16 The confusion came in with the application of the R.C.M. 701(a)
17 analysis combined with relevant case law. Just to point out, Your
18 Honor, from the government's research up to this point, so again, we
19 will execute the Court's order as written, but up to this point, for
20 instance in *US v. Meadows*, 42 MJ 132, CAAF held that, "As generous as
21 this rule is, 701(a)(2), however, by its own terms, it is triggered
22 only by a defense request." And then, it further goes through
23 specificity.

1 MJ: Are you going to give me copies of the case law that you
2 have?

3 TC[MAJ FEIN]: Absolutely, Your Honor, right after this.

4 MJ: Thank you.

5 TC[MAJ FEIN]: We had this since Saturday, trying to get this
6 cleared up. So, 701(a)(2) specifically says, "defense request." So
7 again, from this point forward, based off of the Court's ruling, we
8 will--and, we will retroactively go back to those documents that we
9 have started to look at that were within the possession, custody, or
10 control of military authorities and review it under the 701(a)(2)
11 standard. But, up until this point, we have been operating under a
12 defense request for that material. And even, Your Honor, the
13 analysis that the Court relies on in the MCM says, "Obviously
14 discoverable," not, "Material to the preparation of the defense."
15 So, the government's contention has been that that actually applies
16 to 701(a)(6), not 701(a)(2), which has specific language about a
17 request. We are not asking the Court to even reconsider this, we are
18 just trying to explain why--what has happened up to this point and
19 the confusion of last session. The prosecution is standing by to
20 execute this order as it is written moving forward, Your Honor. And
21 then finally, what is--the fifth question the defense raised, "What
22 is 'material to the preparation of defense'?" I think you just stated
23 it, Your Honor. Absent a specific request, which is what the case

1 law supports, is giving the prosecution notice of what is material to
2 the preparation of the defense. Absent that specific request, the
3 government will go forward and retroactively look for information
4 regarding PFC Manning that involves investigation, damage
5 assessments, or mitigation measures.

6 Thank you, Your Honor.

7 MJ: All right. Anything else?

8 CDC[MR. COOMBS]: Yes, Your Honor. Again, based upon Captain--
9 Major Fein's statements there, it does not appear that he understands
10 701(a)(2). He again is looking at the need for a specific request
11 and he is stressing the word, "obviously", at this point when that is
12 not the standard. The standard here is, if you are looking at it--
13 and, just as the Court has stated to Major Fein, "Major Fein, if you
14 are looking at this and you say to yourself, 'Boy, if I were a
15 defense counsel I would sure like to have this.' That is material to
16 the preparation of the defense." The government here, represented by
17 Major Fein in his argument, seems to again want to stress and argue
18 that there is some specificity requirement in order to ask for
19 things. Now, that may be under *Brady*, under the third prong of
20 *Brady*--or, of 701(a)(6), but when we are talking about 701(a)(2), and
21 when you are talking about information that, as you are looking at
22 it, you think it is material to the preparation of the defense, you
23 have to turn that over. You do not wait for a specific request, and

1 there is no--like, the "obvious" standard here. It is just, when you
2 are looking at, do you think it is relevant and helpful to the
3 defense. So, that is why, again, the defense believes that here
4 again, the government is taking definitions and they are going to
5 stress certain words like, "obviously". "We do not think this is
6 obvious, this could be marginal, but we do not believe it is
7 obvious." Or, you know, they--we are only going to look at--we are
8 looking for stuff, if it is nothing they have requested for, then
9 that doesn't fit within this category. Or, if we know that there is
10 information here, we are not going to look there because, you know,
11 we do not want to have to turn the stuff over. This is not the way
12 discovery practice works and that is why we request that the Court
13 look at the language that we have laid out in our request for
14 clarification and give that needed clarification to the trial counsel
15 because even at this late date, he is trying to litigate the issue of
16 notice as far as, you have got to provide us some specific request
17 for information. That is not 701(a)(2) standard.

18 MJ: Okay, thank you.

19 Yes?

20 TC[MAJ FEIN]: Your Honor, just to clarify, the government
21 agrees with the defense on how to interpret, under what is material
22 to the preparation of the defense. The *Cano* case is directly on
23 point, so the real issue that the government is arguing is the

1 threshold requirements, to be required to do that, not the standard
2 is -- and, absent that threshold requirement, a request, then we have
3 to default to what the prosecution knows which then gets into the,
4 "obvious" language. And, Your Honor, yes, the government does pick
5 on the individual words, just as the Court cited the rule and, the
6 rule--the analysis to the rule says, "obviously discoverable". So,
7 we are relying on the guidance we have from the manual and the
8 supporting case law on what standards we use and what threshold is
9 required to get to those standards.

10 MJ: All right.

11 TC[MAJ FEIN]: And, we will provide the case law after this
12 session.

13 MJ: Thank you. All right, the Court will take this under
14 advisement. Anything else with respect to this issue?

15 CDC[MR. COOMBS]: No, Your Honor.

16 TC[MAJ FEIN]: No, Your Honor.

17 MJ: All right, let us move into the due diligence--well, before
18 we do that, one more thing. The government provided me an e-mail
19 stating that they were going to move for substitutions under Military
20 Rule of Evidence 505(g)(2) for the FBI impact statement and that
21 there would be a classified filing, and also an unclassified and
22 redacted version.

23 Has that been filed?

1 TC[MAJ FEIN]: Yes, Your Honor. On Friday during the same
2 filing for this next round of motions for the July timeframe, that
3 disclosure, similar to what the government did for the DIA, IRTF, and
4 the WikiLeaks Taskforce filing, we did a notice filing, which gave
5 the notice of national security interest involved in protecting and
6 included with that was the redacted *ex parte* motion.

7 MJ: All right, thank you. And, also in that same e-mail, and
8 follow-on e-mails that should be captured by, I think it is Appellate
9 Exhibit 10 that is capturing the e-mails that are going back and
10 forth, the government was going to file a protective order--or, an
11 amendment to the protective order to streamline the ability of the
12 defense to file their pleadings on, whatever website you are filing
13 them on.

14 Defense, is that one of motions that is being planned for
15 the next session as well?

16 TC[MAJ FEIN]: Yes, Your Honor. We put on the government's
17 proposed case calendar. It has been marked as Appellate Exhibit 163.

18 MJ: Okay, and there were subsequent e-mails saying we could
19 resolve that today if the defense did not object, and the defense
20 does object, is that right?

21 CDC[MR. COOMBS]: That is correct, Your Honor.

22 MJ: Okay, so that will be on the calendar for next time as
23 well.

1 CDC[MR. COOMBS]: Yes, Your Honor. Your Honor, I am sorry to
2 backtrack just slightly, but what Major Fein said on the 701(a)(2) of
3 the issue they have is the threshold requirement, of when they have a
4 701(a)(2) standard--obligation. The defense does not understand what
5 the government is saying by, "a threshold requirement," because
6 701(a)(2) is just clear as you are reviewing your files.

7 MJ: I think they are just--if I am understanding the government
8 correctly, the threshold requirement is, "Do I have to go look for
9 and additional file that may be material to the preparation of the
10 defense that I do not know about?"

11 CDC[MR. COOMBS]: Right, and there that would only--well, that
12 kind of confuses things with 701(a)(6) where you give specific notice
13 of where things are at. 701(a)(2) just simply applies to, as you are
14 looking through your files, if you come across something that is
15 material to the preparation of the defense, you have to hand it over.
16 So, as long as his threshold statement is not an additional
17 requirement to that, that is not a problem with the defense. But
18 again, he seems to be reading in some additional requirement of
19 specificity of asking for something or giving additional guidance
20 when none is required. And also, it appears he is saying one point
21 that they have pulled aside stuff that is 701(a)(2) and then later
22 saying, "No, we do not have anything in a hold file of 701(a)(2)."
23 And, that is the area that the defense has never gotten clarification

1 on. So, if that is something we are going to kick to the next 39(a),
2 that would be something we would want the Court to ask, "Do you have
3 a 701(a)(2) file that you have not handed over because you believe
4 you haven't received a specific request for that information?"

5 MJ: Why do I have to wait until next time?
6 Government?

7 TC[MAJ FEIN]: No, Your Honor. We do not have a hold file
8 waiting.

9 CDC[MR. COOMBS]: Okay. And then, no threshold requirement
10 other than when you are looking at the stuff, if you come across a
11 file that you are already looking at and you see something that is
12 helpful to the defense under the 701(a)(2), not something that is--
13 other than just material to the preparation of the defense, that is
14 all that is required in order to cause them to then say, "We have to
15 hand this over."

16 MJ: I see Major Fein is standing up. Do you want to address
17 that?

18 TC[MAJ FEIN]: Yes, Your Honor, if I may?

19 MJ: Yes, go ahead.

20 TC[MAJ FEIN]: Your Honor, again, maybe we are talking past
21 this, but I guess the ultimate issue is, what is in our files, our
22 files, the prosecution's files. The information the defense is
23 requesting that we go search for in a request that is generic and not

1 specific enough is not within the prosecutor's files. We do not
2 intend to use this information, we only obtained a copy of it to
3 review for Brady, and other material, for discoverable material, and
4 have it preserved in case an issue in litigation comes up, because it
5 might be two years later, as the defense points out. So, if the rule
6 is written for open file discovery, it is open file into the
7 prosecutor's files. And, the Courts, even in *Williams*, when applying
8 701(a)(6) talks about how you, for 701(a)(6) purposes, broaden that.
9 But, if what the defense is arguing, that means that the entire
10 military--every document, piece of information, or in the defense's--
11 in the defense's--excuse me, Your Honor. From this Saturday, defense
12 request for clarification to the Court ruling in motion to compel,
13 bottom of page 7, they want to define that information. "It should
14 also be read to include any electronic material." Any electronic
15 material, so not only is it everything you have that could be
16 documentary, but anything like, at the DIA, at CENTCOM, that are on
17 this--or, excuse me, that they claim are material to the preparation
18 of the defense. They have not given a specified request. These are
19 not the prosecutor's files. We have turned over, as the prosecution,
20 everything in our files that would be material to the preparation of
21 the defense except for when we reviewed, probably, three items that
22 are subject to a 505 request that has been calendared. So other than
23 that, they have everything in our files that we intend to use, at

1 this point. So now we are talking about material that is somewhere
2 else that we have obtained copies of for the sole purpose of
3 reviewing.

4 CDC[MR. COOMBS]: Well, that is the issue then. If they have
5 something that they have looked through--we are not asking them to go
6 to--under the 701(a)(2) standard, that is not asking them to go
7 anywhere and go look at anything. It is as you are looking at stuff
8 that is in your possession, so, if you have got it and you are
9 looking through it and you come across something that is material to
10 the preparation of the defense, you have to hand it over. So, not
11 confusing at all 701(a)(6), just dealing with 701(a)(2), if the
12 government has something that they are looking through and they come
13 across information that they believe would be material to the
14 preparation of the defense, that is what they have to hand over.
15 There is no specific request requirement. I am not asking them to go
16 do and conduct a search. What I am saying is when you are looking at
17 stuff as you are preparing your case for trial and as you look
18 through something you come across something that is material to the
19 preparation of the defense, you have to hand it over. So, I think he
20 believes that if it is not in their personal file and if they went
21 and looked at some files and they said, "Hey, 'whatever agency', can
22 we see these files?" And the agency says, "sure." and they look
23 through it, and they are doing a *Brady* search or whatnot, and they

1 come across information that is material to the preparation of the
2 defense, they are saying, "Okay, we do not need to hand that over
3 because this is not in our possession, custody, or control; so we are
4 not handing over." That is--the issue here is, what have you--when
5 you actually have it in your possession, custody, and control, and
6 you are looking through it, if you come across material to
7 preparation of the defense, that is the stuff you have to hand over.

8 MJ: All right, let me see your case and I will take it under
9 advisement.

10 TC[MAJ FEIN]: Yes, Your Honor.

11 MJ: Let's move on to the due diligence. Well, before we get
12 there, does the Government--again, this was filed two days ago. Does
13 the Government need any additional time or are you prepared for me to
14 consider that and decide that today?

15 TC[MAJ FEIN]: We are prepared for you to decide today, Your
16 Honor.

17 MJ: Okay.

18 CDC[MR. COOMBS]: All right, ma'am, with regards to the due
19 diligence, we--the defense made its argument at the last motions
20 hearing so I am not going to remake that argument. However, we have
21 learned additional information since the last year so I would like to
22 highlight a little of that information. At the last Article 39(a)
23 session, we filed a motion to request the government to detail its

1 due diligence search, its *Brady* search, what it has done. And, the
2 government requested time in order to respond to that. They
3 requested an additional two weeks and they were given an additional
4 two weeks in order to file a response to the due diligence aspect of
5 it. That response came and there were no facts put in there by the
6 government; no answers to any of the Court's questions; no answers to
7 any of the issues that the defense raised. The fact that they did
8 not provide answers is troubling, but the other factor saying, "We
9 are not going to provide answers unless the Court orders us to," is
10 also problematic because if you are required to be ordered to tell
11 the Court what you did, that underscores the likelihood of, you are
12 hiding something if you have to have a court order to say, "This is
13 what we did for our due diligence aspect." You look at some of the
14 issues, the HQ, DA memorandum, we talked about that. It said now
15 apparently, if I understand the government correctly, that they do
16 have now three or four discs that they are now going to be searching
17 through. You know, the Court, when they are looking at the fact that
18 they did not respond to that due diligence issued in its motion, that
19 is problematic that they did not lay out to the Court, you know,
20 "Your Honor, here is when we received the discs, the exact timing.
21 This is why we did not follow up on our initial request that was sent
22 to HQ, DA over a year ago. This is how we found out that someone
23 within HQ, DA said, 'Hey, nothing has been done on this.' And then,

1 now we are looking through this material." That simple fact that
2 when you are talking about a *Brady* search within your own backyard
3 and you do not know what is happening and you have not been tracking
4 it, that should be problematic. That one fact alone should be enough
5 for the Court to say, "Government, let me see what you are doing.
6 Lay out what you have done from a due diligence standpoint, what you
7 have looked at, and the timing of that." If the government wanted to
8 file that *ex parte*, that would be perfectly fine with the defense.
9 Just to lay out, again, what they have been doing. Because, if they
10 have not been tracking this within HQ, DA, that obviously is
11 problematic with regards to what they have been doing in other *Brady*
12 searches. The Department of State, they shockingly said at the last
13 hearing that they have not looked at anything other than the damage
14 assessment within the Department of State. And, they got that a few
15 days before they provided that to the Court. We had witnesses come
16 testify about *Brady* information, clearly, perhaps *Brady* information.
17 And yet, it took us getting those witnesses here. That should have
18 been what the government was doing. This is a closely aligned
19 agency. And under *Williams*, under 701(a)(6), they have an obligation
20 to go and search. And what they have basically said his, "We have
21 not done a *Brady* search," when it came to Department of State. And
22 now that is why they need an additional 30 days to go look at the
23 various pieces of information that we were able to uncover. When the

1 Court looks at the government's filing with regards to its proposed
2 witness lists, make note of how many witnesses come from the
3 Department of State. The defense counts 22; 22 witnesses, nearly
4 one-fifth of the government's witness requests are Department of
5 State witnesses and yet it wants this Court to believe that it has
6 not looked at anything other than the damage assessment, roughly a
7 couple of days before it provided to the court. That defies logic.
8 They clearly have been working closely with the Department of State.
9 And, if they have not looked at anything else, then they have
10 basically put off their *Brady* obligations in an effort just to
11 prepare its own case and that should be problematic to the court.
12 The FBI impact statement, it would have been nice to know when the
13 government was made aware of the FBI impact statement. When did you
14 find out about it? The government never answered that in its due
15 diligence response. In our response, we point to the fact that if
16 you look at the government's 22 March 2012 notification to the Court,
17 in its footnote, it states that it is working with federal agencies
18 which it has good faith basis to believe has an impact statement.
19 Well, other than the FBI, the defense is not aware of any other
20 agency that use the terminology, "impact statement." So, it is
21 clear, at least from the defense, and the government is free to clear
22 that up but they want to, but defense believes the government knew
23 about the impact statement as early as 22 March, and more than likely

1 earlier than that. And yet, they never told the Court about the
2 impact statement. It never told the defense about the impact
3 statement. It just held on to that information and then threw it as
4 an afterthought within one of its response motions to the defense.
5 That is problematic. They do not answer any of those questions
6 within their due diligence response. The DHS damage assessment, the
7 defense finds out about that after the hearing is over on 8 June.
8 Government counsel comes up, Major Fein says, "hey, DHS has got a
9 damage assessment. We are going to provide it to you." I asked,
10 "When did you know about this? When did you find out about this?"
11 The only response I get is, "We were given authorization to provide
12 this to you on 8 June." That is it. The defense goes and looks at
13 the damage assessment. It is 160 pages long. And that problem--
14 there are two aspects to this that are problematic. One, this damage
15 assessment was done in 2010. When did the government know about this
16 damage assessment? Two, it is--this damage assessment is addressed
17 to ONCIX, specifically stating this is for ONCIX's damage assessment.
18 Again, going back to what the government know about ONCIX? Because,
19 if they know about this DHS damage assessment, then they should put
20 two and two together that if this is for ONCIX's damage assessment,
21 then ONCIX clearly has something.

22 MJ: I am a little confused on that one.

1 CDC[MR. COOMBS]: This goes back to, like, if you look at page 4
2 of the Department of State damage assessment where it references the,
3 "ONCIX is doing a damage assessment."

4 MJ: Yes.

5 CDC[MR. COOMBS]: And, the government says to the Court, "Well,
6 Your Honor, the first time we looked at that was two days before we
7 provided it to the Court." So, if that were true, okay, maybe they
8 did not know about ONCIX. Here, for DHS damage assessment, this is a
9 damage assessment that is being written and its main headline is,
10 "For ONCIX's damage assessment." And, it is done in 2010. So, if
11 the government had this, I do not know how long they have had because
12 they have not indicated when they received it. They just said, "We
13 were given authorization to provide it to you on 8 June." But, if
14 they have had it four months, say, well then clearly back when they
15 gave notification to the Court as to what ONCIX did and did not have,
16 they were aware of the fact that ONCIX was doing a damage assessment
17 then based upon this sole document alone, indicating that it is for
18 ONCIX.

19 MJ: Okay.

20 CDC[MR. COOMBS]: We have gone back and forth on materials
21 preparation--the materials in the government's possession that are
22 material to the preparation of the defense so I will not rehash that
23 other than to say, again, there is problems as to what the

1 government, the defense believes, what the government believes its
2 obligation is with regards to that. And, they have not provided any
3 answers as to what they are doing and a due diligence accounting
4 would at least assure the Court that the government understands its
5 Brady obligations and its 701(a)(2) obligations. With regards to the
6 other various agencies, when the Court went down its list of the
7 various agencies for the Compel Discover 2, a reoccurring theme of,
8 "We are in the process of reviewing that. We are in the process of
9 reviewing that;" was parroted from the government. We are two years
10 into this process. Why is the government still in the process of
11 reviewing things at this point? Why haven't they actually reviewed
12 these documents and provided these documents in a timely manner to
13 the defense.

14 For the remaining time I want to talk about ONCIX, and I
15 address this in the motion, but I think it is important that the
16 Court pulls at the string of this explanation by the government.
17 Because when you do, it falls apart. You take a look at what the
18 government represented to the Court with regards to ONCIX, and their
19 representations do not ring true. Major Fein got up and he gave a
20 timing account for what the government knew and when. He sated, on
21 16 February, that the government went to ONCIX and said to ONCIX,
22 "ONCIX, what do you have?" And ONCIX replied orally, not in writing,
23 orally to the government, "ONCIX has not produced any interim or

1 final damage assessment in this matter." Fein apparently--Major Fein
2 wrote that down and unfortunately he only told the Court though, in
3 his filing, he told the Court that ONCIX has not completed a damage
4 assessment. So right there, there is a disconnect between what said
5 by ONCIX and what the government reported to the Court. Of course,
6 the defense raised the issue of, "completed," what are we talking
7 about with the term, "completed", and that sparked the Court to send
8 out its email to the government indicating, "Go forward and find out
9 exactly what these various agencies have, to include ONCIX." Major
10 Fein then tells the Court that on 21 March, after receiving the
11 Court's questions, he called up ONCIX again and said, "What do you
12 have?" And, ONCIX again replied orally, not in writing, "ONCIX has
13 not produced any interim or final damage assessment." Major Fein
14 writes this down, and this time, he tells the Court that in the 21
15 March filing. "ONCIX has not produced any interim or damage
16 assessment[sic]." Then Major Fein says that at some point after that
17 they have another conversation with ONCIX and you see this in the
18 verbatim transcript that we typed up, where he says, "We went to
19 ONCIX and we talked to them about what is a draft, what is an interim
20 and we had this conversation with ONCIX as to how you could define
21 things," apparently. Why are you having this conversation with ONCIX
22 about what is a draft; what could be considered a draft; what could
23 be considered an interim report, unless you are trying to craft a

1 definition that allows you plausible deniability with regards to what
2 you represent to the Court. There is no other reason, other than to
3 say, "Hey, let's see how we can define, 'draft' and, 'interim.'" And
4 that is when the government produces its three-page memorandum on
5 investigation, draft, damage. And they say terms are important; you
6 have to use the exact term. So, we have at least three conversations
7 with ONCIX at this point. And then, during the motions argument, the
8 last one, the Court rightfully so, pressed Major Fein on, "Did you
9 ask hollow questions? Did you say, 'Well, okay, what are you doing,
10 if not producing a damage assessment? And, 'what do you have, if not
11 a draft or interim; what are you collecting? Why are you collecting
12 these things?'" And, Major Fein says time and time again, ma'am, "We
13 asked the questions. They answered them. And, we told the Court."
14 He says, "By writing it down, what they said, we have inquired into
15 this and this is what it is. This is the response we received."
16 Fast-forward in his explanation to the Court, "We asked them the
17 questions. We don't have any other access to their files. They
18 answered it. So at that point we relayed to the Court--we relayed to
19 the defense, and the Court ruled." Fast-forward again, "We asked
20 questions, we give the relevant cases--the case law, we show them the
21 discovery request and any other orders and then they gave us the
22 answer." In this case, they gave us this answer. We relayed that to
23 the Court." Fast-forward again, "We asked what is the status of the

1 damage assessment so that we can relay it to the Court and this was
2 their exact wording that we were given. We inquired into the
3 documentation they had that they had that we could report on whether
4 they had a draft damage assessment. And, they reported back again,
5 'To date, ONCIX has not produced any interim or final damage
6 assessment in this matter.' We asked the questions. So we did all
7 of these discussion with entities--with the entity on what the
8 difference could be, but at the end of the day we asked, 'Do you have
9 any documentation or, do you have any damage assessment, and if not,
10 what do you have?' And, these were the responses that we were given
11 and we related to the Court."

12 So, when you look at that, then you have to believe that
13 the conversation goes something like, Major Fein calling up ONCIX,
14 because apparently this is orally, calling them up, saying, "Look,
15 the Court wants to know what you have. Do you have a damage
16 assessment?" And the only thing coming back from ONCIX is, "We have
17 not completed an interim or final damage assessment." And he goes,
18 "Well, you know I understand that, but we have got these documents
19 here that appear that you are tasking agencies to look at stuff and
20 tell you what the damage may be. What are you doing this for?" And,
21 ONCIX just says, "We have not completed any interim or final damage
22 assessment." "Well again, I know that, but I have to go to the Court
23 and I have them what are you doing[sic]. So if you are not doing

1 this, making a damage assessment, what are you doing?" "We do not
2 have any interim or final damage assessment." "Well, what do you
3 have right now? Do you have anything in the works? When do you
4 think you might have something done?" "We do not have anything but--
5 an interim or final damage assessment." I mean, that is the
6 conversation. That defies logic. And, it defies logic when you take
7 a look at the fact that as soon as this Court issued its ruling on 11
8 May, Major Fein says, "We then felt the obligation," apparently, "to
9 share this ruling with ONCIX." Why are you sharing it with ONCIX?
10 Why take the Court's ruling and give it to ONCIX? They didn't give
11 it to the Department of Justice or any other agency that didn't have
12 a damage assessment. Why go to ONCIX? But, apparently, they felt
13 the requirement to share this with ONCIX, or ODNI more appropriately,
14 its parent agency has this eureka moment. "We do have a draft damage
15 assessment." And that is when Major Fein then goes, "Oh, well, you
16 know, we have got to come down and take a look at this." But, when
17 you look at your ruling, Your Honor, this is verbatim; this is what
18 comes from your ruling. "The Court has examined both the classified
19 letter and the classified Department of State damage assessment and
20 finds that the Department of State damage assessment is a draft
21 damage assessment. The fact that it is a draft does not make the
22 draft speculative or not discoverable under R.C.M. 701." That is the
23 extent of your ruling on that issue. There is no eureka moment there

1 that an agency would say, "Oh, based upon that now, I realize I have
2 got a draft damage assessment." And, how does--what happens after
3 this? How does the government alert the Court to this fact that
4 ONCIX does have a draft damage assessment? Major Fein says that once
5 he was--ODNI had this eureka moment, he went down, they had this
6 little meeting and they talked with ONCIX, and then a week later--So,
7 he has this meeting on 18 May. A week later, he sends an--excuse me,
8 a letter to the general counsel of ONCIX. And, when you look at that
9 letter, read that letter. That doesn't read like a letter of
10 somebody just finding out that ONCIX has a draft damage assessment
11 because twice he says, "We need to see the most recent version. We
12 need to look at the most recent version of your damage assessment."
13 Nowhere in there--if you would believe that he was not aware of the
14 fact that they had a damage assessment, you would see somewhere in
15 that letter where it would say, "You know what? We just found out
16 from ODNI that you, in fact, have a draft damage assessment based
17 upon looking at the Court's ruling. This is an important issue. We
18 need to immediately alert the Court to this fact and we need to see
19 exactly what you have. I need to see your draft damage assessment."
20 Think about what you would expect to see in that letter if, in fact,
21 the government was totally unaware of the fact that ONCIX had
22 something. That letter would read differently.

1 And, that is not the end of the things that don't make
2 sense. When you look at the damage assessment and what the
3 government has represented as far as how damage assessments are done.
4 They are multi-year functions. They take forever to do. This Court
5 has to believe that for the past--basically, from the time that ONCIX
6 was sending out information for this back in 2010 up until 21 March--
7 or, 20--yeah, 21 March, when the government makes its representations
8 to the Court, ONCIX didn't have anything. And, at some point between
9 21 March and 11 May, ONCIX creates what would be equivalent to a
10 draft damage assessment. So, 18 months or so of inactivity and then
11 real quickly we create something that is a draft damage assessment,
12 and then not only that, but on 3 July we are going to have it final--
13 or, middle of July we are going to have it final in order to provide
14 to the Court by August. You don't go from 18 months of inactivity to
15 the last couple of months; draft, final. It defies logic and that is
16 why someone from ONCIX would be helpful in order to indicate what it
17 had, when it had, and what representations they actually made to the
18 government. You look at the 63 agencies, Your Honor, the email
19 attachment by Sergeant Bradley; it is important when you look at that
20 email attachment in our due diligence request. You will see where it
21 is sent out in the middle of February of 2012, and he says to ONCIX--
22 or he says to the agency that he is sending it[sic] that, ONCIX
23 cannot share with them the filings that they received from those

1 agencies and that is why they are reaching out to the agencies
2 directly in order to get the documentation that they shared with
3 ONCIX. And, that is the same representation that Major Fein makes to
4 the Court in oral argument; that he had to go--they have to go now to
5 the various agencies because ONCIX won't share the underlying
6 information with them. That is problematic. That fact should raise
7 an issue with the Court when you think about our very first 802
8 session in February of this year where the government said, "We have
9 looked high and low. We have went to the Department of Agriculture.
10 We haven't found any Brady." And yet, we now know in February they
11 are reaching out to these 63 agencies in order to get what they have.
12 The two don't add up. You don't say at the very first 802 session,
13 "We have looked at all of these agencies. We are now at the level of
14 the Department of Agriculture and we haven't received anything that
15 is *Brady*," and what we see from what their--what they have been
16 sending out and actually now beginning to get *Brady*, they start
17 sending this out in February of this year right after the
18 representation they made to the Court and the defense regarding what
19 they have done. And, they are sending this out saying, "We need to
20 see what you have." These are the same 63 agencies. So again, that
21 fact should cause the Court to say, "All right, government, what
22 agencies were you talking about at the 802 where you said you looked
23 and you didn't find any Brady and how are they different, if at all,

1 from the agencies that you are reaching out to in February, just a
2 week after making a representation to the Court?" but, most
3 importantly and most troubling, is Major Fein getting up, saying, "we
4 have never maintained that ONCIX was not doing a damage assessment.
5 We always knew that ONCIX was doing a damage assessment." And then,
6 he makes it seem as if the defense knew it as well because the
7 defense asked for this stuff. We never knew anything about ONCIX
8 doing a damage assessment. In none of our discovery requests do we
9 indicate that we have any facts to know anything about ONCIX doing a
10 damage assessment. The very first time we became aware of anything
11 that ONCIX might be doing was when we started to receive the 12 pages
12 of *Brady*. And, we immediately alerted that fact to the Court, where
13 we said, "Look, we are looking at this." They have indicated that
14 ONCIX does not have an interim or final damage assessment but I am
15 looking at these 12 pages of *Brady* and it is clear ONCIX has
16 something because they are collecting this stuff from 2010." And
17 that is the first time the defense had any information the defense
18 had any information to call the government on this representation.
19 The story doesn't add up. There are too many questions. And, if we
20 only had one of these questions unanswered, we might be able to look
21 past this, but what we have is, we have a pattern of issues that
22 should cause alarm to the Court and we can't ignore these issues.
23 The questions we have about FBI; HQ, DA; ONCIX; their understanding

1 of 701(a)(2); and we will see their most recent case and what they
2 are trying to raise at this point in order to define their way out of
3 discovery. But, this type of discovery battle is almost unheard of
4 in military courts. At this point, especially at this juncture,
5 still having discovery issues is amazing. And, that is because
6 normally these games are not played. Normally this type of behavior
7 is not done. The Government hands over things and it is a fair
8 fight, you hand over the discovery and you let the facts speak. You
9 don't play "hide the ball," and that is what the government has been
10 doing and is consistently doing. We ask this Court put an end to
11 that by requiring them to do a due diligence accounting for their
12 efforts. Subject to your questions, Your Honor?

13 MJ: Nope.

14 TC[MAJ FEIN]: Your Honor, very briefly. So, the United States
15 first would ask you to deny the government--excuse me, the defense's
16 request for a due diligence statement and the government would ask
17 that you deny it based off of the facts that have actually been
18 presented and not an argument about facts that do not exist or are
19 not proper for the Court. First and foremost, day one, post-
20 referral, first 802 conference, and subsequent 802s that culminated
21 going on the record or discussions where the prosecution voluntarily
22 disclosed to the Court and defense on how we project this trial going
23 with a case calendar, based on our due diligence requirements under

1 ethical and legal obligations to search many federal agencies and
2 entities; we disclosed that day one and have been it ever since. The
3 defense is trying now to take a few facts, based off certain times,
4 and assumed facts that are not there in order to create some
5 additional obligation that the prosecution must account for despite,
6 from day one, saying, "there are 'this' many agencies out there. We
7 are going and searching." The prosecution never claimed or proffered
8 that we completed our searches. We, in fact, said that just the
9 opposite. We are in the process of completing the searches and we
10 expect a volume of information that might have to be disclosed to the
11 Court and then that was discussed over multiple times during the
12 802's and culminated on the record when the defense stood up and
13 said, "We will not waive any Brady requirement, the prosecution is
14 going to need to continue doing what they are doing;" which we have
15 been doing since then and will continue.

16 Your Honor, other facts that seem to be confusing here, the
17 way the defense knows about all of these other agencies is because
18 the prosecution, since then, since referral, has been in an ongoing
19 process, searching for the documents pursuant to our ethical and
20 legal obligations and turning them over if it is *Brady* material. If
21 it is not *Brady* material, there is no requirement to turn it over
22 because they are outside the possession of military--possession,
23 control, and custody of the military and they are not being turned

1 over. We do not have approval to do that. But, the defense is
2 receiving the information they are entitled to receive and that is
3 what really the focus here should be. There is no evidence that they
4 are not receiving the information. The prosecution is searching it
5 out, disclosing it, and then what will we disclose is then being used
6 in arguments of what we are not doing. So, there should be no reason
7 the government is required to produce a due diligence statement for
8 the Court based off of the facts that have been proffered to the
9 Court. Additionally, Your Honor, the defense is disregarding the
10 complexity of this case and the amount of classified information and
11 the effect on the entire--well excuse me, the majority of the
12 executive branch, as I just explained, that we have been pointing out
13 to the Court and defense from day one, not trying to hide any aspect
14 of the discovery obligations. To simply say that information might
15 exist and that they prosecution does not have direct access to, we
16 must rely, as you said last time on the record, must rely on the
17 representations made by those agencies to some point until we have
18 some indication otherwise. If they give the information, we relay it
19 to the court. And once we get access to the files, we see it for
20 ourselves. And, just like in previous sessions for Department of
21 State, we have acknowledged to the court that we have not their
22 material. They have not given us access. That is now changed

1 pursuant to the Court's order, along with the *Brady* material, above
2 and beyond the Court's order of last session.

3 Finally, Your Honor, a fact to highlight--kind of what
4 exactly the government is arguing here. The defense even highlights
5 an e-mail from a paralegal assigned to the prosecution that very
6 quickly after referral, e-mails these organizations that we were
7 identified by NCIS as contributing to them, identified that we do not
8 have any authority, and to go directly to them, and that is what the
9 defense has been getting and will continue to get until we complete
10 that task which should be completed very shortly. Finally, Your
11 Honor, as far as the authority in the defense's written brief, they
12 cite the case *Chapman*. *Chapman* - that stands for the government
13 having to do a due diligence accounting for the Court.
14 Unfortunately--well, I guess fortunately for the government, that
15 *Chapman* facts do not even apply to this case, Your Honor. This is a
16 case of where a witness was on the stand and two times prior to the
17 third time, three strikes and you are out, the prosecution did not
18 disclose *Giglio* impeachment material to the defense. And after the
19 court admonished the prosecution twice for this they did it a third
20 time and they were confused. They did not know what they had or had
21 not turned over and it rose to such a high level of misconduct that
22 that is where the case was dismissed. And then, the comment the
23 Court made was that the prosecutor should have some type of log, some

1 type of discovery log to know what has and has not been produced.
2 So, if the court is inclined to follow this, the prosecution has
3 created a log. We are going to talk about that today. Every
4 document that the defense received from the prosecution comes with a
5 Bates number a Bates number, unique identifying number. The
6 prosecution does not use a documents and will not use a document that
7 does not have a Bates number. It makes it very easy for the
8 prosecution and the defense. So again, the *Chapman* case, Your Honor,
9 does not apply. There is no precedence for this is; the government
10 does agree that it is within your power as a military judge to
11 possibly order this and respectfully request that you deny the
12 defense's request. Thank you, Your Honor.

13 MJ: All right.

14 CDC[MR. COOMBS]: Your Honor, briefly, the *Chapman* case does
15 apply. It applies because there, the Court was not willing to hear
16 the government or just rely upon the government's representations
17 that it knew what it was doing and it was complying with its
18 obligations. Here, the defense is not asking for the Court to
19 require the government to share its information with the defense if
20 the Court does not believe that is required. What we are asking is
21 for this Court to assure, not only itself, but the defense and anyone
22 who is watching this case and paying attention to this case, that the
23 government is, in fact, complying with its discovery obligations.

1 The government says that they are still in the process of providing
2 this information and it is an ongoing process and it should be done
3 soon. Well, again, what have they been doing for two years if they
4 are just now in the process of doing this after referral--of
5 collecting this information? You would have to wonder what their
6 obligations were and what their priority was for the last two years
7 if they weren't collecting this information already and securing the
8 information. They talk about the fact that we--they made certain
9 representations in the 802 and then we initially we are going to
10 leave our *Brady* and then we ultimately decided not to wave it.
11 Remember why we did not, because we just simply asked the government
12 to make a due diligence accounting. Show us what you have done. If
13 you show us what you have done and it is clear that you have gone to
14 all of these agencies and there just isn't anything and you can
15 account for what you did then we will waive it and that would make
16 the case go much smoother. But, this really was the very beginning
17 of our discovery issues. This is when we went from the point of
18 giving the benefit of the doubt to realize we had a problem. And, we
19 have been chasing down that issue ever since. Here, this would
20 resolve the issues. And, if the government doesn't have anything to
21 hide, why wouldn't they provide, willingly, to the Court, "This is
22 what we have done." They point out all of the Bates numbers that
23 they provided in discovery. That is just what they provided in

1 discovery, that does not say anything to what they have gone and
2 looked at, what they have not provided, what they have done as far as
3 their *Brady* search obligations or on their 701(a)(2) obligations. So
4 here actually just putting forth, "Here are what--here is what we
5 have done." And, if they did this *ex parte* to the court, and let's
6 just use ONCIX for example, "Ma'am, here is exactly what we have
7 done; when we reached out to ONCIX for the first time; what they said
8 to us;" apparently, only stuff orally but not in writing, "but, here
9 is what we have done with ONCIX." Laying it out for the Court and
10 the Court could look at that, ask whatever questions that would be
11 logical questions to ask from that and if the Court were satisfied
12 that the government was doing its due diligence obligation, that will
13 be good enough for the defense. Same thing with Department of State,
14 "we have not been given access to this stuff until recently. Well
15 okay, you have got 22 witnesses on your witness list so it seems like
16 the Department of State was willing to work with you. So, are you
17 telling me that you have asked to look at the stuff for *Brady* and
18 they kept saying, 'No,' to you? If that were the case, why didn't
19 you come and tell me. Come tell the Court, 'look, we are working
20 with a closely aligned agency. We believe they have *Brady*
21 information. They are not sharing it with us. We could then resolve
22 that under 703." But, they did not do that. So, allow them to do a
23 due diligence accounting for what they have done with Department of

1 State. The court can ask common sense questions, what they knew,
2 what they--what representations were made. And again, if the court
3 is satisfied, that is good enough for the defense. And, we can go
4 agency by agency; with HQ, DA, the questions I would love to ask.
5 Again, if the Court asks these questions of the government, if it is
6 satisfied, that is good enough for the defense. But, the important
7 thing here is unfortunately we have too many problems to just simply
8 take it for their word that they are doing--and understand what they
9 are doing, is the right thing. It does not appear that they know
10 what they are doing when it comes to the 701(a)(2). And, we only
11 have to look to their very first position, that 701 did not even
12 apply to classified discovery. That one thing when the Court said,
13 "You are wrong there." And, that issue alone then should cause the
14 Court to say, "Okay, I want to make sure you are doing what you are
15 supposed to be doing. And, I understand you do not want to share
16 with the defense. The defense is not even asking you to do that.
17 You share it with me, I will take a look at it, if I say it is okay,
18 well we will put this discovery issue behind us." That is what the
19 defense is requesting, Your Honor.

20 MJ: Anything else from the Government?

21 TC[MAJ FEIN]: Not on that issue, Your Honor. We do have three
22 copies of the *Meadows* case.

1 MJ: All right. When we recess the court, Defense, if you
2 would, you also referenced a couple of cases via e-mail that I think
3 I received on Sunday; if you would, get the hard copy as well.
4 CDC[MR. COOMBS]: I don't have the hard copy with me, ma'am. I
5 did e-mail it to the court. If the government could print it, we
6 could provide the hard copy.
7 TC[MAJ FEIN]: We will have it printed as well, Your Honor.
8 MJ: Thank you. All right, is there anything else that we need
9 to address at this time before we recess the court?
10 CDC[MR. COOMBS]: No, Your Honor.
11 TC[MAJ FEIN]: No, Your Honor.
12 MJ: All right, why don't we plan on coming back at 1600; does
13 that work for the parties?
14 CDC[MR. COOMBS]: Yes, Your Honor.
15 TC[MAJ FEIN]: Yes, Ma'am.
16 MJ: All right, Court is in recess until 1600.
17 **[The Article 39(a) session recessed at 1452, 25 June 2012.]**
18 **[The Article 39(a) session was called to order at 1622, 25 June**
19 **2012.]**
20 MJ: This Article 39(a) session is called to order. Let the
21 record reflect all parties present when the Court last recessed are
22 again present in court.

1 All right, the Court is prepared--before we proceed to the
2 issues addressed today, the Court would like to read the ruling
3 regarding the Defense Motion to Compel Discovery, Damage Assessments,
4 WikiLeaks Taskforce. We neglected to do that at the earlier session.

5 That will be Appellate Exhibit 146, the ruling is dated 22
6 June 2012. This ruling supplements the 6 June 2012 ruling of the
7 Court regarding the adequacy of the substitution submitted by the
8 government for the WikiLeaks Taskforce damage assessment.

9 The Court reviewed the government's classified motions for
10 a substitute submitted *ex parte* to the Court. The Court also
11 conducted an *ex parte* review of the original damage assessment and
12 the proposed substitute. In coming to this ruling the court has
13 considered the factors requested by the defense in its 1 June 2012
14 submission:

15 a) What is the extent of the redaction substitutions?

16 b) Has the government narrowly tailored the substitutions
17 to protect the governmental interest that has been clearly and
18 specifically articulated?

19 c) Does the substitution provide the defense with the
20 ability to follow up on leads that the original document would have
21 provided?

22 d) Do the substitutions accurately capture the information
23 within the original document?

1 e) Is the classified evidence necessary to rebut an element
2 of the 22 charged offenses, bearing in mind the government's very
3 broad reading of many of these offenses?

4 f) Does the summary strip away the defense's ability to
5 accurately portray the nature of the charged leaks?

6 g) Do the substitutions prevent the defense from fully
7 examining witnesses?

8 h) Do the substitutions prevent the defense from exploring
9 all viable avenues for impeachment?

10 i) Does the government intend to use any of the information
11 from the damage assessments? If so, is the information limited to
12 the summarized document provided by the government? If the
13 information is intended to be used by the government is not limited
14 to the summarized document, does the defense, in fairness, need to
15 receive the classified portions of the document to put the
16 government's evidence into proper context?

17 j) Does the original classification evidence present the
18 more compelling sentencing case than a proposed substitution by the
19 government?

20 k) Do the proposed substitutions prevent the defense from
21 learning names of potential witnesses?

22 l) Do the substitutions make sense such that the defense
23 would be able to understand the context?

1 m) Is the original classified evidence necessary to help
2 the defense in formulating defense strategy and making important
3 litigation decisions in the case?

4 n) Is it unfair that the government had access to the
5 unclassified[sic] version of the damage assessments and the defense
6 did not? Does that provide a tactical advantage to the government?

7 On 5 June 2012, the Court made the following ruling with
8 respect to the WikiLeaks Taskforce damage assessment, "The government
9 found no unclassified information in its review of the WikiLeaks
10 Taskforce report favorable to the accused and material to guilt or
11 punishment. The government filed an *ex parte* motion for an *in camera*
12 review by the court in accordance with M.R.E. 505(g)(2) to determine
13 whether a proposed government substitute shall be disclosed to the
14 defense and whether disclosure of the classified information itself
15 is necessary to enable the accused to prepare for trial. The Court
16 has conducted an *in camera* review of the classified information
17 considering the factors requested by the defense. The government's
18 substitution discloses *Brady* and R.C.M. 701(a)(6) material but not
19 material under R.C.M. 701(a)(2). The Court does not find at this
20 time that the proposed substitute is sufficient. The Court will meet
21 *ex parte* with government counsel in an area appropriate for review of
22 classified information. The court reporter will transcribe the
23 classified proceedings."

1 On 7 June 2012, the Court met *ex parte* with the government
2 in an appropriate place for classified proceedings. The proceeding
3 was recorded, the court advised the government to add additional
4 *Brady* material to the substitution. The government advised the Court
5 that it has done that. The government has advised the Court that
6 nothing in the WikiLeaks Taskforce report will be used by the
7 government or any government witness during any portion of the trial.
8 The WikiLeaks Taskforce report substitution meets the government's
9 discovery obligations under *Brady* and R.C.M. 701(a) (6) to disclose
10 evidence negating--tending to reasonably negate the guilt of the
11 accused to an offense charged, reduce the degree of guilt to an
12 offense charged, or reduce the punishment. The WikiLeaks Taskforce
13 damage assessment not disclosed to the defense is not material to the
14 preparation of the defense or relevant and necessary for production
15 under R.C.M. 703(f). The government[sic] has ordered that no portion
16 of the WikiLeaks Taskforce not disclosed to the defense will be used
17 by the government or any government witness during any portion of the
18 trial, this includes rebuttal and rule of completeness if the defense
19 introduces or references anything in the substitution. The
20 substitution is sufficient for the defense to adequately prepare for
21 trial and represents an appropriate balance between the right of the
22 defense to discovery and the protection of specific national security
23 information.

1 Ruling. The classified motion by the government to
2 voluntarily provide limited disclosure under M.R.E. 505(g)(2),
3 WikiLeaks Taskforce, is granted.

4 Ordered this 22nd day of June, 2012.

5 All right, the Court is also prepared to rule on the
6 Defense Motion for Due Diligence.

7 [1.] On 10 May 2012, as part of its motion to compel
8 discovery, the defense moved this Court to suspend the proceedings
9 for several weeks and require the government to state with
10 specificity the steps that it has taken to comply with its obligation
11 to disclose information favorable to the defense in accordance with
12 R.C.M. 701(a)(6). Defense further moved the Court to grant a 2 to 3
13 months continuance after receipt of completed discovery until the
14 start of trial. On 29, 30, and 31 May 2012, and on 7 June 2012, the
15 defense submitted additional filings to the Court on this issue
16 expanding its request that the Court suspend the proceedings and
17 require the government to state, with specificity, the steps it has
18 taken to comply with its discovery obligations under R.C.M.
19 701(a)(2), 701(a)(6), and 905(b)(4). The government opposes.

20 2. Defense moves the Court to require the government to
21 answer the following questions: 1) What agencies, 63, has the
22 government contacted to conduct the *Brady* review? Has the government
23 attempted to contact all agencies including interagency committee

1 review, President's Intelligence Advisory Board, House of
2 Representatives oversight committee, to conduct a *Brady* review? 2)
3 When did the government make its inquiry? 3) How many documents did
4 the government review? 4) What were the results of the government
5 review? 5) What did the government ask of these agencies?

6 3. The defense further moves the Court to require the
7 government to turn over *Brady* material or state there is no *Brady*
8 material from the following agencies: CID, DIA, DISA, CENTCOM and
9 SOUTHCOM, FBI, DSS, DoS, DoJ, government agency, ODNI, ONCIX.

10 4. Defense provided the Court with a 17 April 2012
11 memorandum for principal officials of HQ, DA stating, "It was only
12 recently determined that no action has been taken by HQ, DA pursuant
13 to the 29 July 2011 memorandum from DoD OGC, Office of General
14 Counsel, to Headquarters Department of the Army requesting it to task
15 principal officials to search for and preserve any discoverable
16 information.

17 The law. The Court has authority to order the government
18 to provide a due diligence statement in accordance with R.C.M.
19 701(g)(1).

20 Conclusions of law.

21 1. Since referral there have been two broad discovery
22 motions--defense motions to compel discovery in accordance with
23 R.C.M. 701(a)(2) and R.C.M. 701(a)(6) for information from the files

1 of multiple DoD agencies, aligned government agencies, nonaligned
2 government agencies, interagency committee review, President's
3 Intelligence Advisory Board, and House of Representatives oversight
4 committee.

5 2. This is a complex case involving multiple government
6 agencies and entities. The Court is not clear what identifiable
7 files pertaining to PFC Manning, relevant to this case, are
8 maintained by the various agencies, including, but not limited to,
9 those referenced in paragraph 3 above, what inquiries the government
10 has made to discover the existence of agency files pertaining to PFC
11 Manning, when the government became aware of the existence of
12 particular agency files, and what files the government has examined
13 under R.C.M. 701(a)(6), *Brady*, and/or R.C.M. 701(a)(2).

14 3. This Court must rule upon motions to compel discovery
15 that have been filed in this case and a speedy trial motion to be
16 filed by the defense. One document containing the information in
17 paragraph 2 above will assist the Court in addressing discovery and
18 speedy trial issues arising during this trial.

19 4. The Court makes no findings of lack of due diligence by
20 the government. Both parties will have an opportunity to litigate
21 the due diligence of the government in providing discovery during the
22 speedy trial motion.

1 5. By 25 July 2012, the government will provide the Court
2 with a statement of due diligence in the format attached, which is a
3 format of blocks stating: a) the steps the government has taken to
4 inquire about the existence of files pertaining to PFC Manning from
5 government agencies and entities; b) when these inquiries were made;
6 c) when the government became aware of the existence of each file
7 pertaining to PFC Manning from government agencies and entities; d)
8 what files government has searched for *Brady*, R.C.M. 701(a)(6)
9 information, and when; [e] what files the government has searched
10 for information material to the preparation of the defense in
11 accordance with R.C.M. 701(a)(2), and when; f) what information
12 from the above files the government has disclosed to the defense; g)
13 what files the government has reviewed and found no discoverable
14 information; h) what files the government has decided not to
15 disclose to the defense; and, i) what files the government has
16 identified that have yet to be searched for *Brady*, R.C.M. 701(a)(6)
17 and/or R.C.M. 71(a)(2).

18 6. By 25 July 2012, the government will provide a timeline
19 and synopsis of the inquiries and communications between the
20 government and ONCIX.

21 7. The filing by the government will be *ex parte* to the
22 Court. The government will identify what classified filings have not
23 been identified to the defense.

1 8. The Court will not suspend the proceedings pending the
2 government's response. The case calendar will continue into July and
3 August with scheduled motions that are not impacted by receipt of the
4 defense discovery. At the July 2012 Article 39(a) session, the case
5 calendar will be revised to reflect Article 39(a) sessions after
6 August at the six week schedule reflected in the current scheduling
7 order.

8 9. The Court will grant a reasonable continuance to the
9 defense upon receipt of compelled discovery to prepare their case.

10 The defense motion for due diligence filing is granted in
11 part as set forth above, so ordered this 25th day of June 2012.

12 Now, government, in the ruling I gave you until 25th of
13 July. With respect to what I have asked you to do, is that enough
14 time for you to do it?

15 TC[MAJ FEIN]: Your Honor, may the government get back to the
16 Court and the defense on that today? We just have to weigh in light
17 of all of the other requirements.

18 MJ: All right, well at this point, as we stand, the Court
19 understands this is the first time the government has had the
20 opportunity to understand exactly what I am asking of them, so I am
21 going to put the 25 July date, leave it in the order, if the
22 government needs more time, file something telling me why.

23 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: Okay. Anything else with respect to that ruling from
2 either side?

3 CDC[MR. COOMBS]: No, Your Honor.

4 TC[MAJ FEIN]: No, Your Honor.

5 MJ: All right, the Court is also prepared to rule on the
6 Defense Motion for Clarification of Ruling on the Motion to Compel
7 Discovery 2.

8 1. On 23 June 2012, this Court issued a ruling regarding
9 the Defense Motion to Compel Discovery 2. The defense moved for a
10 clarification of the ruling. Both parties request the Court to
11 decide this issue at today's article 39(a) session.

12 This is not actually the ruling, but I do note for the
13 record that the Court has considered the three cases that were
14 provided by the parties to the Court.

15 2. The Court's order applies to files that the government
16 has previously reviewed and files the government will review.

17 3. In its Motion to Compel Discovery, the defense proffer
18 that the discovery is necessary for the defense to accurately assess
19 the damage that the alleged leaks caused. As such, the Court ordered
20 the government to disclose information from file subject to R.C.M.
21 702(a)(2)[sic] that involve investigation, damage, and mitigation
22 measures. The law requires the government to disclose information
23 obviously material to the preparation of the defense. Material means

1 relevant and helpful to the defense. Thus, the government in
2 reviewing files subject to R.C.M. 701(a)(2) will provide the defense
3 any information beyond the investigation, damage, and mitigation
4 matters that are obviously relevant and helpful to the defense.

5 That is the extent of my ruling. The defense is correct;
6 the relevant and helpful standard is the right one to use in R.C.M.
7 701(a)(2). Part of the relevance and helpfulness though, the
8 government needs to be informed as to why information is relevant and
9 helpful, which the defense did its discovery request. So, that is
10 why the word, "obvious," is in the ruling. Everybody understand
11 that?

12 CDC[MR. COOMBS]: Yes, Your Honor.

13 TC[MAJ FEIN]: Yes, Your Honor.

14 MJ: Anything else we need to address?

15 CDC[MR. COOMBS]: No, Your Honor.

16 TC[MAJ FEIN]: No, Your Honor.

17 MJ: Okay. That is all I have for today's agenda. Does either
18 side have anything further that we need to address today?

19 CDC[MR. COOMBS]: Nothing from the defense, Your Honor.

20 TC[MAJ FEIN]: Nothing from the government, Your Honor.

21 MJ: All right, Court is in recess.

22 **[The Article 39(a) session recessed at 1636, 25 June 2012.]**

1 [The Article 39(a) session was called to order at 1002, 16 July
2 2012.]

3 MJ: This Article 39(a) session is called to order.

4 Trial Counsel, please account for the parties.

5 TC[MAJ FEIN]: Your Honor, all parties that are[sic] previously
6 present are again present with the following exceptions; Ms.
7 Williams, court reporter is absent; Staff Sergeant Kathryn Hadaway
8 and Staff Sergeant Antonio Foy have been detailed reporters and are
9 present and they have both been previously sworn.

10 MJ: All right. Before we proceed to our order of march today,
11 Trial Counsel, between the last session and this session I believe
12 there was an exhibit that was entered that had administrative
13 corrections. Would you like to describe that for the record?

14 TC[MAJ FEIN]: Yes, Your Honor. Appellate Exhibit 178 and 179
15 which were already marked, the defense notified the prosecution that
16 there was administrative corrections that needed to be made based off
17 the classification--administrative markings on those documents. On
18 11 July 2012, the United States refiled corrected copy versions of
19 both Appellate Exhibit 178, the prosecution motion to pre-admit logs
20 and prosecution--or, excuse me, Appellate Exhibit 179, the
21 government's classified supplement the government witness list. Both
22 of those were filed via SIPRNET and have previously been provided to
23 the Court reporters to be marked--or substituted in the record.

1 MJ: All right, so the correct copies are in the record, the
2 originals are not, is that correct?

3 TC[MAJ FEIN]: After this session, that will be correct, Your
4 Honor.

5 MJ: All right, and there is no substantive corrections, it is
6 just administrative?

7 TC[MAJ FEIN]: There are no substantive corrections, just
8 administrative markings on the bottom left of the pages.

9 MJ: All right, Defense, do you agree?

10 CDC[MR. COOMBS]: Yes, Your Honor.

11 MJ: All right, that is fine.

12 I also received, via e-mail, notice from the government
13 that there was another document from the Central Intelligence Agency
14 that was at issue, is that correct?

15 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, on 12 July, the
16 United States notified the Court and the defense that on 11 July the
17 prosecution became aware of a follow-on report to the original to the
18 original WikiLeaks task force report and the prosecution intended,
19 and did, reviewed that report on 13 July 2012 and intends to submit
20 any applicable filings to the Court no later than 3 August 2012 with
21 regard to that report.

22 MJ: All right, for the record that notice is Appellate Exhibit
23 208.

INSTRUCTIONS FOR PREPARING AND ARRANGING RECORD OF TRIAL

USE OF FORM - Use this form and MCM, 1984, Appendix 14, will be used by the trial counsel and the reporter as a guide to the preparation of the record of trial in general and special court-martial cases in which a verbatim record is prepared. Air Force uses this form and departmental instructions as a guide to the preparation of the record of trial in general and special court-martial cases in which a summarized record is authorized.

Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

COPIES - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

ARRANGEMENT - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.

2. Judge advocate's review pursuant to Article 64(a), if any.

3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.

4. Briefs of counsel submitted after trial, if any (Article 38(c)).

5. DD Form 494, "Court-Martial Data Sheet."

6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.

7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).

9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).

10. Congressional inquiries and replies, if any.

11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.

12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.

13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).

14. Records of former trials.

15. Record of trial in the following order:

a. Errata sheet, if any.

b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.

c. Record of proceedings in court, including Article 39(a) sessions, if any.

d. Authentication sheet, followed by certificate of correction, if any.

e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.

f. Exhibits admitted in evidence.

g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.

h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.